FEDERALISM

s. 91: postal service, criminal law, military, navigation & shipping, trade & commerce, Indians & lands reserved, banking, "Peace, Order, and Good Government of Canada (POGG)"
s. 92: hospitals, saloon licenses, all matters of merely local or private nature, property and civil rights (13)

VALIDITY

Some types of laws the federal government can make and some types of laws the provincial government can make
ANYTIME YOU ARE CONFRONTED WITH A LAW AND NEED TO FIGURE OUT WHO IS IN CHARGE, UTILIZE THE *MORGENTALER* TEST:

1.) Characterization (what is it?)
- AIM: determine pith and substance: focus only on the impugned law and consider the following factors
- Purpose (colourability = says it is about one thing when it is actually about another)
- Legal and Practical Effects
  - Legal = strict legal operation
  - Practical = how this will impact society as a whole
- Intrinsic Evidence
  - "four corners" of the statute = words in the statute
  - Structure of the statute
- Extrinsic Evidence (history/context of enactment, evidence of mischief/evil, related legislation, hansard --> debates about how extrinsic evidence should be included in characterization)

2.) Classification (to what head of power is best assigned?)
- *Intra vires* or *ultra vires*
- Inside or outside federal/provincial competency
- Heads of Power: POGG Emergency, POGG National Concern, POGG Gap, Criminal Law Power, Trade & Commerce Power
- AIM: assess heads of power best aligned with the pith and substance: identify key tensions and use precedents (tests and analogies/disanalogies)

Morgentaler

Facts	• 1988 - SCC strikes down CC prohibition on abortion on Charter grounds • 1989 - NS Act & Regulation prohibit abortions outside a hospital ○ Argument: regulation is really a criminal law and therefore beyond provincial legislative authority/*ultra vires*
Issue	• Is this a law controlling the quality and nature of healthcare delivery (prov) or punishing what it perceives to be a crime (fed)? ○ Is the provincial statute pith and substance criminal (therefore, *ultra vires*)?
Rule	• Federal Criminal Law Power s. 91(27) includes a prohibition & penalty and serves a public purpose • Provincial Powers ss. 92(7), 92(13), 92(16) include health care

Analysis	• Validity Test (above)
	  ○ Characterization of the law = restrict and punish abortion because it is socially undesirable
	  ○ Classification of the law = criminal law (s. 91(27)) and *ultra vires* the province

Conclusion	• The stated purpose to prevent privatization, reduce costs, and assure quality care was a colourable because it's true pith and substance was to replace a criminal law • The legislation is *ultra vires* the province of Nova Scotia as it is criminal law in pith and in substance

VALIDITY - HEADS OF POWER

POGG Gap Residuary Branch
Matters not "in and for the province" per s. 92 - if it is not listed as a provincial responsibility, it is a federal one. For example:

- s. 92(11) includes "incorporation of companies with provincial objects" but POGG Gap Branch includes "incorporation of companies with 'other than provincial objects'" in *John Deere Plow* (1915)
- s. 92(13) includes "property and civil rights in the provinces" but POGG Gap includes "regulation of property rights outside province" in *Re Newfoundland Continental Shelf* (1984)

POGG Emergency Power Branch

- Explicitly declare the existence of an emergency
- Have reasonable grounds or rational basis to declare emergency
- Legislation can only introduce temporary measures
- NOTE: Parliament can "pre-empt or avoid an emergency" - does not have to "wait until the emergency has actually commenced" (Monahan)

Re Anti Inflation Act (1976)

Facts	• Feds imposed temporary measures on wages, profits and prices (provinces could opt-in) • Measures applied to: federal public sector, large private sector firms and provincial government employees (if opt-in)
Issue	• Is the Act *intra vires* feds under POGG Emergency or is it *ultra vires* feds as a matter of property and civil rights?
Rule	• s. 91 - POGG • s. 92(13) - property and civil rights

Analysis	• Majority (Laskin): Act is valid crisis legislation because:
	  ○ Temporary measures
	  ○ Preamble emphasizes "serious national concerns" (no explicit mention of "emergency")
	  ○ Extrinsic evidence shows "rational basis" for declaring emergency
	  ○ Inherently linked to federal powers like monetary policy, T&C
	• Dissent: found no declaration of emergency (declaration of emergency is necessary)

Conclusion	• Act is *intra vires* under POGG emergency

- *War Measures Act* (1914-1988) activated in WWI, WWII, and October (FLQ) Crisis by a cabinet decree that "war, invasion, or insurrection, real or apprehended exists" and enabled cabinet to take any measures deemed "necessary or advisable for the security, defense, peace, order, and welfare of Canada." Replaced by *Emergencies Act* (1988).
- *Emergencies Act* (1988) defines national emergency as not being able to be effectively dealt with under "any other law of Canada" and "seriously endangers ... lives, health, or safety" or threatens "sovereignty, security, and territorial integrity of Canada" and provincial inability to address.
  - Outlined procedure for declaration of emergency (prior provincial consultation, parliamentary debate, inquire and report to parliament) - highlights democratic spotlight on decision to use this power.
  - The powers are time limited (e.g., 30 days for public order emergency).
  - This Act is subject to the *Charter*.
  - NOTE: this Act is ONE mechanism for constitutional power to be exercised; however, it does not cover ALL the powers the federal government has - it is merely a quicker and more efficient method than creating new legislation through the "traditional" process for any new emergency (adds some shape to federal government power but is not an exhaustive list of government power).
  - Only been invoked once (2022 Freedom Convoy Blockade).
- The *Clarity Act* (2000) triggers a specific one-time process (time-limited) in response to the *Quebec Secession Reference* (1998) to determine whether a referendum question is clear and whether a clear majority expresses itself. NEVER BEEN INVOKED.

POGG National Concern Branch *(GGPPA)*

1. Threshold Inquiry: National Concern:
   a. "inherent national concern — matters which, by their nature transcend the provinces"
   b. "newness" not required
2. Singleness, Distinctiveness, and Indivisibility:
   a. Single: "specific and identifiable matter" ; "qualitatively different" from provincial matters (Extraprovincial/international ; character/effects ; International agreements)
   b. Distinctive: must be different from matters of provincial concern
   c. Indivisible: provincial Inability
      i. Provinces incapable (constitutionally) of enacting

ii. Can't succeed without cooperation of all provinces
iii. "Grave extraprovincial consequences" of failure to cooperate

3. Scale of Impact on Provincial Jurisdiction: intrusion on provincial autonomy vs. consequence of denying federal authority
    a. Latter must outweigh former to justify

Reference Re Greenhouse Gas Pollution Pricing Act (GGPPA)

Facts	• 2018 Parliament enacted *GGPPA* but constitutionality challenged by three provinces • Act established minimum national GHG pricing standards • Act only in effect where pricing system in province is not stringent enough - provinces can choose their own scheme
Issue	• Is the Act *intra vires* feds on POGG National Concern or is the Act *ultra vires* feds as a matter of provincial authority
Rule	• s. 91 POGG • s. 92 - property, civil rights, matters local in nature

Analysis	• Characterization: true Pith & Substance is minimum national standards of GHG price stringency to reduce emissions
	• Classification:
	  ○ Threshold: minimum national GHG pricing "critical" to respond to "existential threat" of climate change
	  ○ Singleness/distinctiveness/indivisibility:
	  ■ Specific, identifiable pollutant (contrary to *Hydro Québec*)
	  ■ GHG pricing is limited and different from other regulatory mechanisms
	  ■ Interprovincial/national impact (like *Crown Zellerbach*)
	  ■ Provincial inability:
	  • Cannot act alone, failure of one would jeopardize scheme (leakage), grave consequences of inaction
	  ○ Scale of impact:
	  ■ Real but qualified impact on provincial autonomy
	  ■ Grave, irreversible consequences of denying fed authority
	• Dissent (Brown): Pith & Substance is to regulate trade and industry and should be under s. 92 - concerns about creating a federal power "limited only by the imagination" that is "corrosive of Canadian federalism"

Conclusion	• Act is *intra vires* feds under POGG national concern

- Enables federal government to legislate in relation to distinct matters of inherent national concern in a narrow/limited (specific) scope
- Because these powers are "permanent" and because federal law is "paramount," in cases of inconsistency there is a <u>core tension</u> between POGG National Concern (s. 91) and Property and Civil Rights (s. 92).
- History
    - Emergence in *Russell* (1882) and *Local Prohibition* (1896) when discussing how "some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion"
    - *Canada Temperance* (1946) also says "real subject matter...goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole."
- Case Law
    - *Johanneson* (1952) discusses how aeronautics is an example of national concern
    - *Munro* (1966) discusses how maintenance of "national capital region" is an example of national concern (too important to be left to provinces to decide how to manage due to the overlap between ON and QC)
    - *Re Anti Inflation Act* (1976) the dissent (Beetz J) discusses how "containment and reduction of inflation" is **NOT** an example of national concern
        - Too broad for national concern branch
        - National concern branch is permanent
        - It is actually under EMERGENCY POGG POWER
    - *Crown Zellerbach* (1988) discusses how marine dumping is an example of national concern as it is a specific environment of national significance (sea waters)
    - *Ontario Hydro* (1993) discusses how atomic energy is an example of national concern
    - *Hydro-Quebec* (1997) is too broad and is a specific criminal issue; therefore, the environment more generally is **NOT** an example of national concern per LaForest (in *obiter*) and Lamer CJ/Iacobucci J (dissenting)

Criminal Law Power

1. Criminal form (prohibition & penalty)

    a. Prohibitions may include exceptions or be "circuitous" or indirect (*RJR*)
    b. Detailed regulation is acceptable as long as true function is prohibition/penalty (*Hydro-Québec*)
2. Public Purpose
    a. Public peace, order, security, morality (*Margarine Reference*)
    b. Health (*RJR*)
    c. Environment (*Hydro-Québec*)
    d. List of criminal law purposes not frozen in time (*RJR*; *Hydro-Québec*)
3. Broad topics, narrow form (prohibition & penalty)
    a. Not applicable to laws repealing a criminal offence (*Québec v Canada*)
4. Criminal law power cannot be employed "colourably"
5. Law does not upset federal/provincial balance of power (added in *Re Firearms Act*)

Core tension: between federal criminal law power (s. 91(27)) and provincial authority (s. 92(14): administration of justice, s. 92(13): property and civil rights, s. 92(16): local and private matters) - e.g., *Morgentaler*.

History:

- *Re Board of Commerce Act* (1922); "subject matter is one which by its very nature belongs to the domain of criminal jurisprudence"; E.g. incest; competition law *ultra vires* criminal law power
- *Proprietary Articles Trade Association (PATA)* (1931); Prohibition & Penal Sanction; competition law *intra vires* criminal law power

Reference Re Margarine (1949)

Facts	• Federal *Dairy Industry Act* prohibited manufacture, sale and import of margarine
Issue	• Is the *Act intra vires* federal jurisdiction (criminal law power) or is it extra vires federal (regulation of industry)?
Rule	• Introduces criminal form (prohibition and penalty) and public purpose

Analysis	• P&S of *Act* is providing trade protection to dairy industry by banning margarine
	  ○ Intrinsic evidence: location within dairy industry regulation
	  ○ Extrinsic evidence: margarine is equivalent to butter in nutrition/safety
	• Industry protectionism is not within scope of criminal law power (*intra vires* province)
	• Lacks public purpose: "there is nothing injurious or dangerous to be abolished or removed" rather it is "a matter of preferring certain local trade to others"

Conclusion	• *Act* is *ultra vires* federal jurisdiction other than the clause banning import of margarine (valid under T&C power)

RJR MacDonald v Canada

Facts	• **Tobacco Products Control Act** (federal legislation) introduced packaging restrictions and health warnings
	  ○ Prohibited advertising and promotion of tobacco
	  ○ Exemption for foreign products in imported publications (too difficult to administer)
	  ○ Penalties ranging from $2k/6mos prison to $300k/2yrs prison

Issue	• Is the legislation valid under 91(27) – criminal law power? ○ PROBLEM: this seems preventative (appears regulatory)
Rule	• Criminal form (prohibition & penalty) and public purpose

Analysis	• **Criminal Form (Prohibition & Penalty)**
	  ○ Criminal form requirement is present
	  ○ Court notes that this is an unusual use of the power b/c the ban does not directly apply to the "evil" (smoking) → "circuitous" approach can meet criminal form requirements
	  ■ Intermediate measures acceptable, especially where direct ban impractical
	  ■ NOT colourable attempt to regulate industry (no treatment of product quality, labour relations, etc.
	  ■ Exemptions don't detract from criminal form (reasons for exceptions relate to the administrability and make the law possible)
	• **Public Purpose**
	  ○ Aimed at serious health effects of tobacco → health is not enumerated but health is often the purpose behind criminal law

	○ Criminal law not "frozen in time" → new public purposes can be introduced
Conclusion	● Majority: Legislation is *intra vires* federal criminal law power ○ Court found that pith and substance was not colourable – not trying to regulate industry but rather is trying to target smoking ● Dissent: this act is too far removed from the harm, it is a regulatory measure and therefore *ultra vires*

Hydro-Québec

Facts	● **Canadian Environmental Protection Act (CEPA)** introduced with procedures for defining "toxic" substances, regulations, etc. ○ Extensive regulation of toxic substances (s. 34) ○ Interim orders regulating substances not yet deemed toxic if immediate action required (s. 35)
Issue	● Is the CEPA *intra vires* federal jurisdiction under criminal law power or *ultra vires* federal jurisdiction as it attempts to regulate industry?
Rule	● Criminal form (prohibition & penalty) and public purpose
Analysis	● P&S is not colourable - combat toxic substances where provinces have inability to handle them ● **Criminal Form (Prohibition and Penalty)** ○ Defines prohibitions on use of toxic substances and imposes penalties for non-compliance ○ Regulatory in nature but the prohibition aim is sufficient to make it criminal law power ● **Public purpose** ○ Environmental protection ○ Criminal law purposes can grow and change with time ○ Focus is on dangerous chemicals and not on industry protection, telling industry how to function is incidental ■ S. 35 emergency provision confirms focus on health/safety
Conclusion	● *Act* is *intra vires* federal jurisdiction under the criminal law power

Re Firearms Act (2000)

Facts	● **Firearms Act, 1995** (federal legislation) introduced gun control licensing and registration system for firearms, including "long guns" ○ Licensing regime imposed conditions, incl. how to store firearms ○ Failure to comply with licensing and registration = Criminal Code offense ● 1996 - Alberta reference to ABCA ○ This is a property licensing regime, *ultra vires* federal government ○ Then, appealed to SCC
Issue	● Is the Firearms Act *intra vires* federal jurisdiction under criminal law power or *ultra vires* federal jurisdiction as it attempts to regulate industry?
Rule	● Criminal form (prohibition & penalty) and public purpose
Analysis	● P&S: enhancing public safety by controlling firearms through prohibitions and penalties ● **Criminal Form (Prohibition and Penalty)** ○ Prohibition/penalty for "Possession without a license" ○ Regulatory aspects are secondary to criminal law purpose ■ Complexity acceptable (Hydro Quebec) ■ Inherently dangerous nature of firearms (not like cars, land titles) ● **Public Purpose** ○ Gun control ● Law does not upset federal/provincial balance of power (new element added in this decision)
Conclusion	● *Act* is *intra vires* federal jurisdiction under the criminal law power

Postscript	• 2012: Parliament introduced legislation to abolish long gun registry
	  ○ Quebec objected, announced plans to create own registry
	  ○ Asked federal government to turn over data re guns in Quebec
	  ○ Feds refused, announced plan to destroy data
	• Quebec: Reference re plan to destroy long gun registry data
	  ○ *Quebec v. Canada*, 2015 SCC 14: federal plan to destroy long gun data is constitutionally acceptable
	  ○ Criminal form requirements don't apply to law repealing a criminal offense
	  ○ (Provincial government has authority over property regulation - so the courts clearly allow some overlap here)
	• Federal Gun Buyback
	  ○ Provincial resistance to participation

Criminal Law	**POGG National Concern**
BROAD topics E.g. Health, Environment, Morality, Public Order NARROW form Prohibition & Penalty	BROAD form Regulatory power NARROW topics E.g. Minimum standards for GHG pollution price stringency

Provincial Punishment and Morality

not a provincial head of power - but an exception to the federal criminal law power

- Preventative in nature (*McNeil; Dupond*)
  - Can include prohibition, however
- Cannot have Pith & Substance of banning an evil/something injurious (*Hydro-Québec; Morgentaler; RJR*) and cannot tackle evils/harms inherently associated with criminal law power (*Morgentaler; RJR; Hydro-Québec*)
- Anchored to a matter within provincial jurisdiction (not *Westendorp*) and serves valid provincial regulatory purpose
  - Industry, property, civil rights, matters of a local nature
  - Prohibitions regulating an industry are *intra vires* province (*McNeil*)
- Provision cannot supplant criminal law (*McNeil*)
- Provision must be sufficiently integrated into the legislative scheme (*Rio Hotel*) and cannot be an intrusion in the provincial law (*Westendorp*)
  - If Pith & Substance of provision matches Pith & Substance of law, likely sufficiently integrated
  - Prohibition should enforce standards created in comprehensive provincial regulatory scheme rather than enforce legislature's view of morality
  - Prohibition merely means of enforcement rather than way to ban offensive conduct occurring on provincial property
  - Regulatory scheme is backed by compelling temporary, local circumstance which requires firm control in anticipation of crisis or to respond to it

Core tensions:

- FEDERAL: moral restrictions on abortion (*Morgentaler*)
- FEDERAL: restricting use of toxins (*Hydro-Quebec*)
- FEDERAL: restricting tobacco advertisement (*RJR*)
- PROVINCIAL: industry protection (*Margarine Reference*)

NS Board of Censors v McNeil (1978)

Facts	• **NS Theatres and Amusements Act** (provincial act) created censor board with broad power
	  ○ Unfettered power to permit or forbid showing of films
	  ○ Breach of board's decision = monetary penalties and revocation of theatre owner's license
	  ○ Board banned Last Tango in Paris
	  ○ McNeil challenged the NS Board - saying this is a criminal charge

Issue	• Is the Act *ultra vires* provincial power because it falls under federal criminal law power?
Rule	• Preventative, doesn't Pith & Substance of banning an evil/something injurious, anchored to a provincial matter, serves valid provincial regulatory purpose, does not supplant criminal law, and sufficiently integrated into the legislative scheme
Analysis	• Pith & Substance: "Regulation, supervision and control of the film business" • 92(13)

	○ "Use of property (i.e., films)" ○ "Provincial authority over transactions taking place wholly within the Province" ○ Prevention not prohibition → licensing scheme with rules and standards (licenses can be revoked) ■ Act is not aimed at creating a criminal offence but rather aimed at regulating a business within the province ● 92(16) ○ Regional diversity can make morality "local" matter ■ Standards of what is moral can vary depending on region ● Relationship to Federal Criminal Law ○ "Morality and criminality are not coextensive" ■ Legislation which authorizes the establishment and enforcement of a local standard of morality is not necessarily an invasion of the federal criminal law jurisdiction ○ Moral aim does not make business regulation "criminal" ○ There is already a criminal law prohibiting obscenity; however, this does NOT exclude possibility of concurrent criminal law
Conclusion	● Majority: Act *intra vires* provincial authority ○ The law was NOT prohibitive because it did not prohibit people from going to the theatre. It prohibited the theatre from showing the movie. As a result, it PREVENTED people from seeing it. Rather than prohibiting them from seeing it. Because they could go see it at home. ○ Morality and criminality are not coextensive; provinces can legislate within the domain of morality in some cases. ○ Provincial regulation with concurrent criminal law is allowed. ● Dissent: ○ P&S: "determination of what is decent or indecent or obscene" ○ 91(2): effort to "supplement the criminal law" (preventative form masks prohibitory function) ● Majority and dissent agree on the law but disagree on how the facts

Dupond v City of Montreal

Facts	● 1969 - Montreal protests ● City of Montreal (municipality) bylaw allowed ordinances banning/prohibiting parades or other gatherings (for 30 days) that endanger tranquility/safety/peace or public order in public places (threats to "safety, peace, or public order") ○ Penalties for non-compliance include fines and imprisonment
Issue	● Is the bylaw *ultra vires* provincial jurisdiction as it falls under the federal criminal law power?
Rule	● Preventative, doesn't Pith & Substance of banning an evil/something injurious, anchored to a provincial matter, serves valid provincial regulatory purpose, does not supplant criminal law, and sufficiently integrated into the legislative scheme
Analysis	● Bylaw is preventative in nature - Pith & Substance of avoiding destruction and violence ● Bylaw is a regulation of the municipal public domain and falls within provincial jurisdiction to regulate matters of a local nature
Conclusion	● Majority: Bylaw is *intra vires* provincial jurisdiction ○ Bylaw is a local matter that is preventative ● Dissent: viewed bylaw as *ultra vires* attempt to reinforce criminal law ○ Viewed bylaw as "mini Criminal Code" dealing with breach of the peace and maintenance of public order ○ "Should alarm free citizens" → rights analysis ○ HOWEVER - later in time, dissenting judge (Laskin) reflects on this dissent and finds that the bylaw could have been upheld as it was a temporary measure ■ In *Westendorp*, Laskin CJ's decision arose in *Dupond* b/c the regulations were temporary and applied to a local emergency → so now, the *Dupond* case is viewed somewhat like a local emergency power (when time limited)

Westendorp v The Queen

Facts	• Calgary bylaw 9022
	  ○ General business and trade in city streets restricted
	  ○ Penalties of fines ($20-300) or jail time (60 days)
	  ○ s. 6.1 added restrictions on sex work
	  ■ Penalties of fines ($100-500) or jail time (up to 6 months in prison)
	  ■ Recital (preamble): collect in groups, source of annoyance and embarrassment, right and ability to move freely (framed as a property/nuisance issue rather than a morality/criminal issue)
	• Westendorp charged with being on the street for the purpose of prostitution - contravenes bylaw

Issue	• Is the bylaw *ultra vires* provincial jurisdiction and falls under federal criminal law power?
Rule	• Preventative, doesn't Pith & Substance of banning an evil/something injurious, anchored to a provincial matter, serves valid provincial regulatory purpose, does not supplant criminal law, and sufficiently integrated into the legislative scheme

Analysis	• P&S is to control or prohibit prostitution, rather than control streets - colourable (purports to regulate matters of local nature)
	  ○ Similar/analogous to *Morgentaler*
	• Bylaw has criminal form (prohibition and penalty) and purpose
	• Bylaw is an obvious attempt to punish prostitution and does not deal with obstructions more generally
	• Treatment of prostitution as "public nuisance" intrudes too far into criminal law sphere - same logic could apply to drug trafficking, assault, unhoused people, etc.
	  ○ Offends division of legislative powers

Conclusion	• Majority: bylaw is *ultra vires* provincial jurisdiction

Rio Hotel v NB Liquor Board

Facts	• NB Liquor Control Act
	  ○ Liquor Licensing Board authorized to attach conditions to liquor licenses
	  ○ Rio Hotel liquor license precluded nude performances
	  ○ Federal Criminal Code also had several provisions regarding public nudity

Issue	• Is the NB Liquor Control Act *ultra vires* provincial jurisdiction and falls under criminal law power?
Rule	• Preventative, doesn't Pith & Substance of banning an evil/something injurious, anchored to a provincial matter, serves valid provincial regulatory purpose, does not supplant criminal law, and sufficiently integrated into the legislative scheme
Analysis	• Double Aspect = "when…viewed in one light the subject falls within the legislative competence of Parliament and, viewed in another light, within the legislative competence of a provincial legislature" ○ Parliament and legislature can have overlapping laws/regulations • Provision is integrated into a comprehensive scheme of regulation and is NOT an intruded provision
Conclusion	• Majority: Act is *intra vires* provincial jurisdiction

Federal Trade & Commerce Power

Federal T&C power encompasses (*Parsons*):

- Parsons Branch #1: Interprovincial and international trade
  - Ex. *Manitoba Egg Reference*
  - Ex. *Margarine Reference*
    - Forbids import of margarine (Parsons Branch 1 allows the federal government to regulate any imports and exports, even if they target a specific industry.)
    - Not valid criminal law power but import provision upheld under T&C
    - Power to prohibit imports is "clearly necessary to the nation's jurisdiction over trade with other states"
- Parsons Branch #2: General trade affecting the whole dominion
  - Indicia outlined in *GM v CNL* - not requirements, rather guides/indicators that an *Act* is *intra vires*
    - Act contains regulatory scheme

        - Act under oversight of regulatory agency
        - Act is concerned with trade in general and not a specific industry (REQUIREMENT)
        - Provinces acting alone or in concert would be constitutionally incapable of enacting the scheme
        - Failure of 1+ provinces to act would jeopardize the successful operation of the scheme elsewhere
    - Regulation of specific industries does NOT fall under this power (provincial)
        - Ex. *NS Board of Censors v McNeil*
            - Nova Scotia regulates film industry
        - Ex. *Labatt*
            - *Food and Drugs Act* (federal) set min/max alcohol content for "light beer"
            - Labatt Special Lite Beer exceeded max
            - Labatt = national company, advertised and distributed nationally
            - Regulation *ultra vires* because it targeted a specific industry
    - Needs to regulate national economy as a whole
        - Competition law (*GM v CNL*)
        - Trademark law (*Kirkbi*)
        - Systemic risk in stock markets (*Pan Canadian Securities Reference*)

Core Tension: Between Federal Trade & Commerce powers s. 91(2) and provincial property and civil rights powers s. 92(13)

Parsons (PC 1881)

Facts	• Ontario *Fire Insurance Policy Act* (provincial statute) which stipulated certain conditions in all fire insurance policies entered into in the province • Challenged by insurance company
Issue	• Is the Act *intra vires* the provincial jurisdiction?
Rule	• Interprovincial and international trade • General trade affecting the whole dominion ○ Regulation of specific industries does NOT fall under this power (provincial)

Analysis	• Statute was valid in relation to property and civil rights in the province
	• Federal T&C power does NOT include:
	  ○ "the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province"
	• Federal T&C does include:
	  ○ 1.) Interprovincial or international trade and commerce
	  ○ 2) "general" trade and commerce affecting the whole dominion
	• Should not be federal trade and commerce power because that power should not include the power to regulate contracts of a particular business or trade
	• Mutual modification: federal power is NOT what the provincial power IS
	  ○ Provincial power = regulate one specific industry, business, trade
	  ○ Federal power = what the provincial power is NOT – by exclusion, court defines the federal trade and commerce power

Conclusion	• The Act is *intra vires* provincial jurisdiction

Carnation (1968)

Facts	• Quebec Agricultural Marketing Board
	  ○ Regulated price of milk sold from farmers to processors (incl. Carnation)
	  ○ Carnation exported most dairy to other provinces (outside of QC)

Issue	• Is the Act *ultra vires* provincial jurisdiction (because it falls under federal T&C power)?
Rule	• Interprovincial and international trade • General trade affecting the whole dominion ○ Regulation of specific industries does NOT fall under this power (provincial)
Analysis	• Board orders *intra vires* the province

	○ Orders not "directed at the regulation of interprovincial trade" → directed at transactions occurring within the province for one specific industry ○ Effect on cost of doing export business in Quebec **incidental** ○ Export provisions were an **incidental** aspect ○ Price increase out of province is **incidental**
Conclusion	● Board orders *intra vires* the province

Manitoba Egg Reference (1971)

Facts	● "Chicken and Egg War" ● Long term competition between ON & QC about eggs ● ON enacted scheme to protect ON chicken farmers from QC chickens → banned QC chickens and eggs ● QC enacted scheme to protect QC chicken farmers from ON chickens → banned ON eggs and chickens ● Fed gov't refused to send reference to the SCC so Manitoba enacted identical legislation and appealed *ultra vires* finding to SCC to make the decision binding
Issue	● Are the Manitoba (and QC and ON) schemes *ultra vires* as they fall under the federal T&C power?
Rule	● Interprovincial and international trade ● General trade affecting the whole dominion ○ Regulation of specific industries does NOT fall under this power (provincial)
Analysis	● Scheme aimed at regulation/restriction of interprovincial trade ● Does not aim to regulate one specific industry, impact on interprovincial trade is not incidental ● After *ultra vires* finding, Canadian Egg Marketing Agency enacted through interlocking fed/prov legislation ○ Provs controlled local aspects ○ Feds controlled inter-provincial trade aspects ● *Manitoba Egg Reference* distinguished from *Carnation* because effects on interprovincial trade are NOT incidental. Pith & Substance is regulation of interprovincial trade (unlike *Carnation*)
Conclusion	● Act is *ultra vires* provincial jurisdiction and falls under the federal T&C power ○ Law aimed at regulation of interprovincial trade ○ "[D]esigned to restrict or limit the free flow of trade between the provinces"

Re Ag. Products Marketing (1978)

Facts	● Canadian Egg Marketing Agency (CEMA) ○ Enacted through "dovetailing" federal and provincial legislation (fed and prov gov't came together) ■ Provinces controlled local aspects ■ Federal government controlled interprovincial trade aspects
Issue	● Is this a valid scheme or *ultra vires* federal (or provincial) jurisdiction?
Rule	● Interprovincial and international trade ● General trade affecting the whole dominion ○ Regulation of specific industries does NOT fall under this power (provincial)
Analysis	● "Principle of exhaustiveness" ○ Between the two of them → the prov and fed gov't can achieve whatever policy objectives they want (following limits of the *Charter*)
Conclusion	● SCC found this to be a valid scheme (*intra vires* both jurisdictions)

GM v CNL (1989)

Facts	● *Combines Investigations Act* ○ Prohibited anti-competitive practices ■ Price discrimination

	■ Monopolies ■ Misleading advertising
Issue	● Is the Act *intra vires* federal jurisdiction (because this is T&C)?
Rule	● Interprovincial and international trade ● General trade affecting the whole dominion ○ Regulation of specific industries does NOT fall under this power (provincial)
Analysis	● Aim: "ensure the existence of a healthy level of competition in the Canadian economy" ● "Concerned with the regulation of trade in general" NOT "a particular industry" ● General T&C Power: "Designed to control an aspect of the economy that must be regulated nationally if it is to be successfully regulated at all"
Conclusion	● *Intra vires* federal jurisdiction ● Creates the indicia (factors) listed under Parson's Branch #2 (above)

Kirkbi (2005) "Lego v Mega Bloks"

Facts	● Trademarks Act – prohibits passing off your products as though they are created by someone else ● Lego sues Mega Bloks for an injunction to force Mega Bloks to stop commercializing their products – too similar to Lego
Issue	● Is the Act *intra vires* federal jurisdiction (because this is T&C)?
Rule	● Interprovincial and international trade ● General trade affecting the whole dominion ○ Regulation of specific industries does NOT fall under this power (provincial)
Analysis	● *Intra vires* 91(2) ○ Act contains "regulatory scheme" ○ Scheme under oversight of an agency ■ Idea is that the entire economy functions better if every industry is protected by this ○ Concerned with trade in general NOT specific industry ○ Provinces constitutionally unable to legislate ■ Provinces unable to act alone – could within jurisdiction but could not act for the Canadian economy as a whole ○ Interprovincial failure to cooperate would jeopardize scheme
Conclusion	● *Intra vires* federal jurisdiction

Re Pan-Canadian Securities Reg (2018)

Facts	● 2011 = previous *Re Securities Act* = *ultra vires* because the *Act* regulates a specific industry (securities trade) and a province's non-participation does not jeopardize scheme ○ Regulated stock market ○ Provinces can opt in - non-participation does NOT jeopardize scheme ○ P&S: regulate all aspects of the trade in securities ● However - managing systemic risk is federal because of the domino effect that could harm entire financial system ○ Use cooperative, dovetailing approach ● Inspires new approach: 2018 Pan Canadian Securities Regulation - interlocking fed/prov scheme ○ Model *Capital Markets Act* for provinces which regulates day-to-day of security trade ○ Model *Capital Markets Stability Act* for feds (more limited scope) ■ P&S: provide protection to investors, foster competition, contribute to stability of financial system ○ Securities jointly overseen by fed/prov finance ministers
Issue	● Is the Act *intra vires* federal jurisdiction (because this is T&C)?
Rule	● Interprovincial and international trade

	• General trade affecting the whole dominion ○ Regulation of specific industries does NOT fall under this power (provincial)

Analysis	• Characterization: "regulation of nationally significant systemic risk"
	  ○ Limited to serious threats to economy as a whole
	• Classification: Parsons Branch #2 (applied *GM v CNL* indicia)
	  ○ Regulatory scheme
	  ○ Overseen by agency
	  ○ Concerned with trade in general rather than specific industry ("stability of economy generally, not…one economic sector in particular" and, like *GM v CNL*, "aimed at stamping out risks and practices that are unhealthy to the Canadian economy"
	  ○ Provinces cannot implement scheme alone
	  ○ Interprovincial failure would jeopardize scheme

Conclusion	• Act is *intra vires* federal T&C power under Parsons Branch #2

Can *ultra vires* or *prima facie* invalid legislation be saved? Double aspect doctrine, Mutual Modification, and ancillary powers can save invalid or *ultra vires* legislation.

Double Aspect Doctrine (DAD)

- Exists where there is evidence of possible or existing law at both levels
- Allows concurrent application of valid federal and provincial laws up to the point of duplication
- Applies where there are two different existing or possible laws, one prov and one fed, and parts of the laws overlap in certain aspects
  - Each law has Pith & Substance dedicated to its own jurisdiction but provisions overlap
- DAD applies
  - *McNeil* and *Rio Hotel*: business regulation with moral aim
  - *Hodge*: see below
  - *Multiple Access*: see below
- DAD does NOT apply
  - *Westendorp*: DAD does NOT apply as the provincial law is *ultra vires* (punishing prostitution is classic subject of Fed criminal law power)
  - *Morgentaler*: DAD does NOT apply as the provincial law is *ultra vires* (restricting abortion is classic subject of Fed criminal law power) → Majority: DAD applies; Dissent: DAD does NOT apply
  - *Lacombe*: majority - DAD does NOT apply and says that bylaw is *ultra vires* by regulating aeronautics, dissent accepts DAD - aeronautics in one aspect but zoning in another

Mutual Modification (MuM)

- Provincial authority starts where federal authority ends
- E.g., *Parsons*

Hodge

Facts	• ON *Liquor Licence Act* regulated liquor trade • Legislation about liquor trade (according to *Russell*) is federal authority
Issue	• Does DAD apply to allow concurrent application of provincial law and federal jurisdiction area?
Rule	• Exists where there is evidence of possible or existing law at both levels • Allows concurrent application of valid federal and provincial laws up to the point of duplication • Applies where there are two different existing or possible laws, one prov and one fed, and parts of the laws overlap in certain aspects ○ Each law has Pith & Substance dedicated to its own jurisdiction but provisions overlap
Analysis	•
Conclusion	• Court applied DAD - legislation is *intra vires*

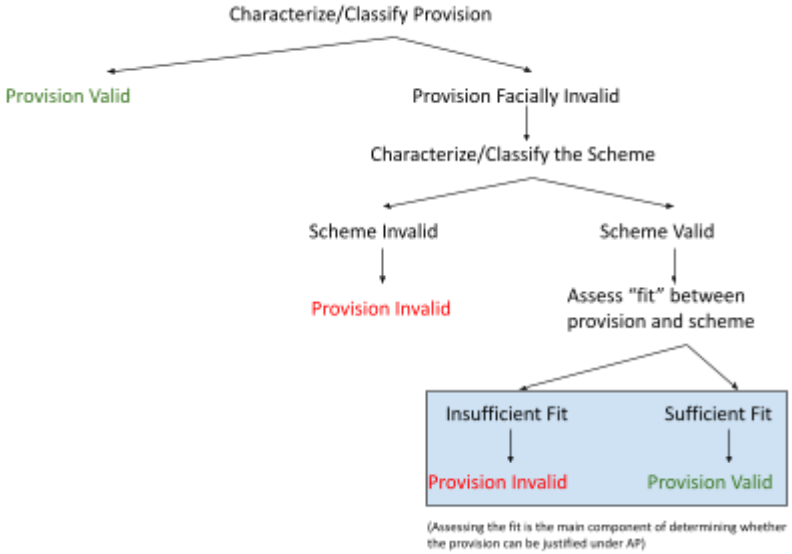
Multiple Access v McCutcheon

Facts	• *Ontario Securities Act* prohibited insider trading on Toronto Stock Exchange - 92(13)

	• *Canada Corporations Act* prohibited insider trading for federal corporations (valid under POGG gap power) • Both Acts prohibit insider trading
Issue	• As both laws are valid, does DAD apply to allow concurrent application?
Rule	• Exists where there is evidence of possible or existing law at both levels • Allows concurrent application of valid federal and provincial laws up to the point of duplication • Applies where there are two different existing or possible laws, one prov and one fed, and parts of the laws overlap in certain aspects ○ Each law has Pith & Substance dedicated to its own jurisdiction but provisions overlap
Analysis	• The federal law regulates the internal ordering of companies, which is provincial jurisdiction • The provincial law regulates trade in securities, which is federal jurisdiction to the extent that it impacts the economy as a whole • These aspects are equally-weighted (aspect of federal law overlaps with provincial law) and the contrast between the relative importance of the two factors is not sharp - impossible to tell which aspect of each law is more important than the other
Conclusion	• DAD applies

Ancillary Powers
(aka AP, Ancillary Doctrine, Ancillary Powers Doctrine, Necessarily Incidental Doctrine)

- Specific provisions "in pith and substance" *ultra vires* BUT connected to a larger valid "scheme"
  - Scheme = system created by law (typically by one or more statute)



- Variable Test of "Fit" (*GM v CNL*)
  - If the intrusion into prov/fed powers is marginal, then a functional connection between the provision and scheme required
    - Marginal intrusion:
      - "Remedial" (*GM; Kirkbi*)
      - "Limited scope" (*GM; Kirkbi*)
      - Precedent (*GM → Multiple Access; Kirkbi*)
    - Functional connection:
      - Reinforces goal of Act (*GM*)
      - Integrated into "purpose and philosophy" of scheme (*GM*)
      - Without provision, scheme would have "gap" (*Kirkbi*)
  - If the intrusion into prov/fed powers is "highly" intrusive, then a "stricter test" is necessary
    - "Necessarily incidental"
  - BUT so far, SCC majorities since GM always apply "functional connection" test → the necessary incidental principle has never been implemented
    - Probably fine to classify an intrusion as marginal because you have nothing as an example of "highly" intrusive

Grant Truck Railway v Canada [1907]

Facts	• Federal statute prohibited railways from "contracting out" liability for employee injuries • Railways → Federal jurisdiction (92(10)) BUT liability → Provincial jurisdiction (92(13))
Issue	• Is the Act *intra vires* federal jurisdiction (even though there is a provision relating to a civil right)?
Rule	• Specific provisions "in pith and substance" ultra vires BUT connected to a larger valid "scheme"

Analysis	• JCPC:
	  ○ Liability provision clearly "deals with a civil right"
	  ○ BUT STILL VALID if "this law is truly ancillary to railway legislation"
	  ○ Here law aims at management and function of railways
	  ○ Provision valid

Conclusion	• *Intra vires* federal jurisdiction

Other federal civil suit provisions (all add mechanisms to further the purpose of the schemes):

- E.g. *GM v CNL*
  - Valid because integrated into competition law (91(2))
  - ***Leading case for ancillary powers
- E.g. *Kirkbi*
  - Valid because integrated into trademarks law (91(2))
- E.g. *Multiple Access*
  - Valid because integrated into federal corporations law (POGG)

Lacombe (2010)

Facts	• By-Law No. 210
	  ○ Permits required for specified activities
	  ○ Neighbours complained about "float planes"
	• By-Law No. 260 added to require permits for aerodromes
	  ○ Stated purpose: balance interests of cottagers against commercial land use
	  ○ SCC Characterization: prohibit certain aviation activities
	  ○ SCC Classification: Federal aeronautics jurisdiction (POGG)

Issue	• Is the law nonetheless valid because it is integration into a valid zoning bylaw (justified under AP doctrine)?
Rule	• If the intrusion into prov/fed powers is <u>marginal</u>, then a <u>functional</u> connection between the provision and scheme required • If the intrusion into prov/fed powers is <u>"highly" intrusive,</u> then a "stricter test" is necessary

Analysis	• Provincial law (municipal regulation) is invalid, no discussion for double aspect
	• **No functional connection** to the valid scheme
	  ○ Not highly intrusive but it is a "**stand alone prohibition**" and does not fit well with scheme of bylaw
	  ○ **Does not actively further** the scheme of the bylaw
	  ○ 210 purpose is to rationalize land use to benefit general population
	  ○ 260 purpose is to ban a land use everywhere, not in relation to the issue raised in that it removes in some areas but not in others and keeps it permitted in some zones but not in other similar zones
	  ○ There is no gap – does not enhance or remove issue from 210 and is not integrated or supplemental

Conclusion	• AP doctrine does not apply • Provincial legislation invalid → *ultra vires* provincial jurisdiction

[Federalism doctrines respecting VALID laws]
OPERABILITY (PARAMOUNTCY)

- When does paramountcy apply?
  - Provincial law creates operational conflict with federal law
    - Impossibility of Dual Compliance Test
    - Cannot follow both laws

        - If there is no conflict (both laws are valid) → see double aspect
    - Provincial law frustrates federal legislative purpose
        - Compare Pith & Substance
- The federal law is paramount over the provincial law, which is inoperative
- Valid provincial laws are inoperative to the extent of any inconsistency with valid federal laws

Multiple Access v McCutcheon

Facts	• *Ontario Securities Act* prohibited insider trading on Toronto Stock Exchange - valid under 92(13) • *Canada Corporations Act* prohibited insider trading for federal corporations (valid under POGG gap power)
Issue	• As both laws are valid, is there a conflict/frustration that renders the ON Act inoperable?

Rule	• Paramountcy applies when:
	  ○ Provincial law creates operational conflict with federal law
	  ■ Impossibility of Dual Compliance Test
	  ○ Provincial law frustrates federal legislative purpose
	  ■ Compare Pith & Substance

Analysis	• Both laws are valid and operable, there is no conflict - dual compliance possible simply by not insider trading
	• Duplication "is the ultimate in harmony" - no frustration of purpose
	• ONLY use paramountcy when:
	  ○ "actual conflict in operation"
	  ○ "one enactment says 'yes' and the other says 'no'"
	  ○ "compliance with one is defiance of the other"

Conclusion	• Both laws are valid and operable, dual compliance is possible

Ross

Facts	• *Criminal Code* establishes penalties for driving offences
	  ○ Judge prohibited Ross from driving for 6 months, exception for work commute (order stated that license would not be suspended)
	• ON *Highway Traffic Act* establishes penalties for driving offences → stricter provincial law
	  ○ ON registrar suspended Ross' licence for 3 months, no exceptions (Valid "civil consequences of a criminal act")
	• Both are valid

Issue	• Is there a conflict between the *CC* provision and the *Highway Traffic Act*?

Rule	• Paramountcy applies when:
	  ○ Provincial law creates operational conflict with federal law
	  ■ Impossibility of Dual Compliance Test
	  ○ Provincial law frustrates federal legislative purpose
	  ■ Compare Pith & Substance

Analysis	• *Prima facie* issue: Ross could comply with feds but be in violation of ON *Act* by driving to work
	• However:
	  ○ No evidence that federal law creates affirmative right to drive
	  ○ No evidence that federal law intends to "cover the field"
	• Dual compliance possible by not driving at all

Conclusion	• Both laws are operable • Sometimes a stricter provincial law is valid because you can still comply with both

Bank of Montreal (BMO) v Hall

Facts	• Federal *Bank Act* allows BMO to immediately seize farm equipment placed as collateral on loan after default (valid 91(15) - banking) • SK *Limitation of Civil Rights Act* requires BMO to give notice of intention to seize (valid 92(13))

	• BMO failed to give notice before seizing Hall's farm equipment
Issue	• Does SK Act create operational conflict or frustrate federal purpose?

Rule	• Paramountcy applies when:
	  ○ Provincial law creates operational conflict with federal law
	  ■ Impossibility of Dual Compliance Test
	  ○ Provincial law frustrates federal legislative purpose
	  ■ Compare Pith & Substance

Analysis	• Conflict: federal Act allows immediate seizure upon default, Parliament intended to create one scheme for realising debt
	• Provincial law is thus inoperative to the extent that it regulates Bank Act seizures:
	  ○ Dual compliance technically possible (Province could refuse to enforce provision requiring notice, federal law does not prohibit BMO from filing notice)
	  ○ But "dual compliance will be impossible" when provincial law "frustrates Parliament's legislative purpose"
	  ■ Dual compliance & frustration of purpose are not the same, either is sufficient to invoke paramountcy
	  ○ SK Act frustrates federal purpose of creating sole scheme for realising debt
	  ■ Province cannot qualify a right given under federal law
	  ■ Here, SK Act restricts the federal process
	  • Prevents process from being an immediate seizure by requiring banks to give notice

Conclusion	• SK Act frustrates federal purpose and is inoperative to the extent that it frustrates that purpose

Mangat

Facts	• *BC Legal Profession Act* prohibits non-lawyers from appearing as counsel for pay (valid: 92(13) and 92(14)) • *Federal Immigration Act* permits non-lawyers to appear as counsel before IRB (valid: 91(25) ("Naturalization and Aliens"))
Issue	• Does the BC Act create operational conflict or frustrate federal purpose?

Rule	• Paramountcy applies when:
	  ○ Provincial law creates operational conflict with federal law
	  ■ Impossibility of Dual Compliance Test
	  ○ Provincial law frustrates federal legislative purpose
	  ■ Compare Pith & Substance

Analysis	• Dual compliance possible "at a superficial level" (become a lawyer or work for free)
	  ○ Federal law does not require hiring non-lawyer
	  ○ It is possible to comply with the stricter law
	• BUT contrary to federal purpose:
	  ○ Informal, accessible (financially, culturally, linguistically), expeditious immigration process
	  ○ Did not grant positive entitlement

Conclusion	• There is a frustration of federal purpose; thus, federal law is paramount ○ Provincial law is inoperative to the extent of the inconsistency with the federal law → one provision is inoperative (prohibiting non-lawyers from appearing as counsel)

Rothmans, Benson and Hedges v Saskatchewan

Facts	• Federal *Tobacco Act* restricts promotion of tobacco products except for brand elements/price/availability (valid 91(27)) • SK *Tobacco Act* bans all tobacco advertising in premises where minors may be present (valid 92(13)) • Both laws are valid (*RJR*)
Issue	• Does SK *Act* create an operational conflict or frustrate a federal purpose?

Rule	• Paramountcy applies when:
	  ○ Provincial law creates operational conflict with federal law
	  ■ Impossibility of Dual Compliance Test
	  ○ Provincial law frustrates federal legislative purpose
	  ■ Compare Pith & Substance

Analysis	• Dual compliance: possible to comply with stricter law
	  ○ Either ban minors in establishment or do not allow tobacco advertisements at all
	• Frustration of federal purpose: Federal *Act* does not grant "positive entitlement" to display products (contrary to its aim)
	  ○ No statutory language that indicates federal Act intends to occupy the field
	  ○ Could not do so with criminal law (3Ps in *RJR*)
	  ○ Laws have the same purpose (duplication is ultimate harmony (*Multiple Access*))
	  ■ Federal law is enhanced by provincial law
	• Federal AG submission: feds have no issue with SK *Act*

Conclusion	• SK *Act* is operable (no conflict/frustration)

Alberta v Maloney

Facts	• *AB Traffic Safety Act (TSA)*
	  ○ AB may recover costs of victim compensation from uninsured drivers
	  ○ If you do not pay, AB gov't can suspend license
	• *Federal Bankruptcy and Insolvency Act (BIA)*
	  ○ Upon "discharge" following bankruptcy, respondent released from all debts
	  ○ Uninsured driver declared bankruptcy under fed BIA
	  ○ Contested TSA suspension

Issue	• Does the AB Act create operational conflict or frustrate federal purpose?

Rule	• Paramountcy applies when:
	  ○ Provincial law creates operational conflict with federal law
	  ■ Impossibility of Dual Compliance Test
	  ○ Provincial law frustrates federal legislative purpose
	  ■ Compare Pith & Substance

Analysis	• Analysis should be focused on effect instead of purposes
	• Burden of proof on party who alleges conflict
	• Operational conflict: provincial law gives province right to do something that federal law denies
	  ○ Federal law creates "positive entitlement"
	  ■ "The Provincial law gives the province a right that the federal law denies"
	  ○ The fact that the province could choose not to pursue claims does not avoid conflict
	  ○ Bankruptcy and Insolvency Act provides a "complete code" as to which debts survive bankruptcy
	• Obiter from Coté: there is a frustration of federal purpose (bankruptcy act tries to give debtors a "fresh start" and AB act frustrates that)

Conclusion	• Operational conflict is present; however, in *obiter* from Côté, frustration of federal purpose is also found ○ Provincial law is inoperative to the extent of the inconsistency with the federal law • Concurring decision holds that there is indeed a conflict but it is actually due to a frustration of federal purpose

APPLICABILITY (INTERJURISDICTIONAL IMMUNITY (IJI); EXCLUSIVITY)

- Provincial law impairs the core of federal jurisdiction (or vice versa)
  - Not enough to affect or touch core, must be IMPAIRMENT
- Valid provincial laws are inapplicable to some federal people, things, places, undertakings (and vice versa)
  - There are certain very "federal" areas that prov law cannot cover, even if there is no overlap → there are some things across jurisdictions that are immune, even from valid legislation
    - Creates space, particularly for the fed gov't to maintain jurisdiction - even if they haven't created a law on it (does not involve a tension between fed and prov law)

        - In theory, works in the other direction for provinces as well (hasn't really been applied though)
- Heavy reliance on precedent: interprovincial communications (phone, telecommunications, radio, broadcasting, cable), banks, ferry/port services, airlines/aeronautics/airplanes, interprovincial railways/highways)
    - All outlined in *Canada Labour Code*

IJI Precedents

- *Bonsecours*: municipal laws requiring clearing ditches DO apply to ditches beside railways but NOT if they relate to structural forms that might affect trains
- *Toronto Corporation*: municipal construction regulations DO NOT apply to telephone poles
- *Kellog's*: provincial laws prohibiting advertising to children through cartoons DO apply to ads on TV (means through which ads are made is NOT at the "core of telecommunications")
- *Air Canada*: provincial mark-up on price of liquor to serve on flights DOES apply to airlines as liquor is not at the "core" of airline travel
    - This would NOT be the case if service of food/water affected
- *COPA*: provincial "green belt" law does NOT apply to placement of aerodromes
    - Sibling case to *Lacombe* (court said that even if the bylaw was valid, it would not be applicable due to IJI)

Concerns (*CWB*)

- Shifting towards cooperative federalism ⟶ trend towards overlap of authorities, concurrent jurisdiction, rejection of watertight compartments
- Democracy: sense that we have democratic-elected people who are creating laws, and those laws should be respected
- Asymmetrical or centralizing results
- Uncertainty
- Abstract discussion of "cores fraught"
- Risk of legal vacuums (areas of social life that might not be legislated by anyone)
- Superfluous in light of paramountcy (if the fed gov't wants to make rules about a fed area, they can do so and it will be paramount to the extent of the overlap)
- Ancillary powers and double aspect makes it difficult to predict ⟶ need to be really well supported by precedent to use IJI

Bell Canada (1988)

Facts	• Federal Jurisdiction = 91(29): Subjects "expressly excepted" from provincial jurisdiction • Provincial Jurisdiction = s. 92(10): "Local Works and Undertakings other than…Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces" ○ Other than = federal gov't responsibilities • Quebec labour law applied to reassign pregnant worker ⟶ but pregnant worker worked for Bell Canada
Issue	• Does the valid provincial labour law apply to Bell Canada?
Rule	• Provincial law impairs the core of federal jurisdiction • Valid provincial laws are inapplicable to some federal people, things, places, undertakings

Analysis	• Federal works, things or persons not subject to provincial law = telegraph
	• Heads of power have a "basic, minimum, unassailable content"
	  ○ Even if they can use paramount laws
	  ○ And even if the individual application of law might not affect or impair operation of undertaking
	  ○ We NEED more certainty that federal law will be applicable (that is where IJI comes into play)
	• Even if individual application of the law might now affect or impair the operation of undertaking (would not sink the whole thing), the overlap may threaten core of federal jurisdiction
	• Canada Labour Code applies to workers of federal government and NATIONAL INDUSTRIES

Conclusion	• Provincial labour law INAPPLICABLE to Bell Canada ○ Federal works, things or persons NOT subject to provincial law regarding "specifically federal" aspects • Even though the one reassignment wouldn't impair fed telecommunication ability, it is still immune from the valid provincial law

Canadian Western Bank

Facts	• Bank's historic function limited to doing deposits/loans • Over time - industry blurred/expanded

	• Banks are federal under 91(15) but insurance is provincial under *Parsons* • 1991 Federal *Bank Act* allows banks to promote credit-related insurance • 2000 Alberta *Insurance Act* subjected banks to insurance sales regulation (licenses, required training, ethics, etc.) ○ Banks (federal) enters provincial area - must be regulated
Issue	• Is the sale of insurance at the core of banking?
Rule	• Provincial law impairs the core of federal jurisdiction • Valid provincial laws are inapplicable to some federal people, things, places, undertakings

Analysis	• Trend towards cooperative federalism (Pan Canadian Securities Reference)
	  ○ Rejection of "watertight compartments"
	• Banking is not an area to protect from insurance (secondary consideration to 91(15))
	  ○ "Peace of mind" insurance is bit "absolutely indispensable or necessary" to banking activities
	• Enumerated concerns about IJI

Conclusion	• Alberta *Act* applies to banks • Sale of insurance is not considered to be at the core of banking: "The promotion of 'peace of mind' insurance can hardly be considered 'absolutely indispensable or necessary' to banking activities unless such words are emptied of their original meaning" → you can keep on banking while following the AB *Insurance Act* • This is the case where a lot of people thought IJI would die but the court held that they are keeping it, but in a very restrained form

PHS Community Services Society (Insite) (IJI for federal law - fails)

Facts	• Safe-injection site in Vancouver, proven that safe-injection sites reduce HIV, AIDS, HEP C and overdoses • Federal control of *Drugs and Substances Act* prohibits possession & trafficking of drugs • Safe-injection site had exemption from minister allowing them to offer services • Exemption expired and Insite went to court to seek more permanent solution
Issue	• Does the federal criminal law apply to Insite? Or are treatment decisions at the core of provincial jurisdiction over health?
Rule	• Provincial law impairs the core of federal jurisdiction • Valid provincial laws are inapplicable to some federal people, things, places, undertakings

Analysis	• Insite: treatments at the core of health care (prov jurisdiction) which triggers IJI against federal *Act* at safe-injection sites
	• Court said IJI cannot apply:
	  ○ IJI does not apply to broad and amorphous areas of jurisdiction
	  ○ Provincial power over health is too broad and does not have a core
	  ○ No precedent dealing with health and IJI
	  ○ Recognition of IJI might produce vacuums or uncertainty (potential for the need to criminalize certain aspects of health in the future - federal regulation of pharmaceuticals)

Conclusion	• Health does not have a core, IJI does not apply

Federalism Interpretive Approaches

Cooperative federalism (modern approach): the federal and provincial government should cooperate/let democratic majorities provincially and federally make decisions.

Watertight compartments (historic approach - viewed critically): policing boundaries and minimal overlap

Mutual modification: we can see some of where provincial power ends (the limits) by looking to where the federal power starts (and vice versa)

Living Tree: interpret documents in a way that works for the contemporary Canadian state

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

INTRODUCTION TO THE CHARTER

- Before the Charter, there was Parliamentary sovereignty and little judicial review of the impact on individuals/groups (lawmaking process was paramount to courts)
  - The Charter moved us from a system of Parliamentary supremacy to one of judicial review

- Exceptions: "**Implied Bill of Rights**" & **Statutory Rights**
- "Implied Bill of Rights"
    - Derived through cases/ little emphasis on individual experience/ related to system of Parliamentary democracy
    - Cases limiting prov authority to protect freedom of speech, press, assembly, and religion
    - E.g., *Alberta Press Case* (1938): Legislation was *ultra vires* province because ourConstitution "similar in principle" to UK → therefore, the provincial government cannot interfere with democracy (even though there is no specific right to freedom)
    - BUT, there are limits → e.g., *Dupond* (1978)
        - "None of the freedoms [of speech, of assembly, etc.] is so enshrined in the Constitution as to be above the reach of competent legislation"
        - Not actually constitutionally enshrined - saying something *ultra vires* the province implied it is *intra vires* the federal government
            - 1.) Limits only local government
            - 2.) Less certain form of protection (not constitutionally enshrined)
- Statutory Rights
    - *Canadian Bill of Rights* (1960)
        - Still a part of the law (just less common because we have the *Charter*) but not entrenched in the Constitution
        - "It is hereby recognized and declared that in Canada there have existed and shall continue to exist…" [rights to equality, free speech, etc.]
    - BUT, there are limits → e.g., *Lavell*
        - Ordinary legislation (not entrenched)
        - Applied only to federal government (not provincial)
        - Viewed as "frozen rights" - frozen in time (meant to reflect the way the law was at the time)
        - No equality violation to strip Indian Act status of women (but not men) who marry a non-status person
        - Justified by the Canadian government because all women were treated equal and all men were treated equal
- Road to the *Charter*
    - Bill of Rights (1960) and human rights protests
    - Failed efforts to patriate Constitution since 1920s
    - Failed Quebec Secession Referendums (May 1980)
    - Draft Constitution (October 1980)
    - 1981 Joint Committee of Parliament (POLITICAL COMPROMISE)
        - Text of patriation revised to reflect input – lots of Indigenous groups participating in the process and seeking further revisions to the text (addition of s. 35)
    - "Night of Long Knives"(final version approved in the middle of the night without the representative of Quebec)
    - Constitution Act, 1982
        - Patriation (piece of Canadian Law → Canada Act, 1982)
        - Amending formula (binds everyone, including Quebec → even though they didn't agree with this)
        - Parliamentary Sovereignty → Judicial Rights Review (by courts)
        - Tension between democracy and rights

Section 1

- "The Canadian Charter of Rights and Freedoms **guarantees the rights and freedom**s set out in it subject only to such **reasonable limits** prescribed by law as can be demonstrably justified in a free and democratic society"
- Rights guaranteed → subject to reasonable limits
- RECALL: *Sauve* and *Frank*
    - 2 stage analysis: (1) Has the right been infringed? And (2) Is the infringement justified under s 1?

Rights

- S. 3 "right to vote" for House of Commons and provincial legislatures
- S. 7 "right to **life, liberty and security of the person** and the right, not to be deprived thereof except in accordance with the principles of fundamental justice"
- S. 15(1): "Every individual is **equal** before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"

Interpretive Provisions

- S. 25: The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any **aboriginal, treaty, or other rights** or freedoms that pertain to the aboriginal peoples of Canada
- S. 27: This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the **multicultural heritage** of Canaidians
- S. 28: Notwithstanding anything in this Charter, rights and freedoms guaranteed by it are available **equally to male and female persons**

Remedies

- S. 52(1): The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, **to the extent of the inconsistency of no force or effect**.
    - Court can strike a law if it is inconsistent with the provisions of the Constitution → the law stops being a law
- S. 24(1): Anyone whose rights or freedoms as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances
    - Court can do whatever they want when there is a Charter violation
- S. 24(2): Exclusion of evidence - evidence obtained through a violation of a Charter right cannot be presented in Court

Notwithstanding/Override Clause

- S. 33(1): Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature…that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter
    - Requirements:
        - Expressly state (*Ford v Quebec (AG)*)
        - Sunset provision → 5 year maximum; must re-enact after 5 years if wanting to continue
        - Courts will **NOT** require legislatures to justify or constrain use of s. 33 (Ford v Quebec (AG))
    - Allows the democratic majority of elected officials to override the views of the Court as to whether or not a law should continue to operate (includes notwithstanding declaration in the text of the law)
    - Cannot apply to the rights related to democracy → citizens have the ability to vote the government out to avoid having their rights trampled on
    - E.g., Québec Bill 21 (religious attire/wear banned)

Ford v Quebec (AG)

Facts	• QC Legislature tried to mass override Charter protection with a blanket application of the notwithstanding clause • Omnibus invocation of section 33 provided blanket application of s. 33 across all Acts of the Quebec Legislature
Issue	• Contention is that the Act did not specify which rights it intended to override - suggests that the Charter requires an Act invoking s. 33 to specify which of ss. 2, 7-15 it is operating notwithstanding of • Rationale: nature of right or freedom being limited must be sufficiently drawn to the attention of the legislature and of the public (political cost for overriding a guaranteed right or freedom)
Analysis	• Blanket invocation of s. 33 must be respected - no need for a more specific link between rights overridden and the Act invoking s. 33 • Standard override provision is a valid exercise of the authority conferred by s. 33 ○ A section 33 declaration is sufficiently express if it refers to the number of the section of the Charter which contains the provision(s) to be overridden • No reason why more should be required • Cannot give retrospective effect to the override provision (s. 33)

CHARTER APPLICATION AND DIALOGUE

- The Charter applies to legislation and executive action (governmental entities and governmental actions)
- The Charter does NOT apply directly to the CL (you cannot say a CL rule violates the Charter) … BUT Charter values must be considered by courts as they develop the CL

Section 32(1): This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province

- Private action (non-government action) is not subject to the Charter (*Dolphin Delivery*)
    - The Charter does not cover private employment, parenting, private housing, etc.
- Government includes bureaucrats and administration

What counts as "Government"?

1. Governmental Entity
    a. Entity governmental "by its very nature"
    b. Requires a context specific inquiry
    c. Entity "controlled" by government
        i. E.g., Transit Authorities (*Greater Vancouver* (2009))
        ii. E.g., Municipalities (*Godbout* (1997))
        iii. E.g., Law Societies
        iv. E.g., NOT hospitals (*Stoffman* (1990))

1. More institutional independence

v. E.g., NOT universities (*McKinney*)
1. More institutional independence
2. Exception: student right to hold demonstrations on campus (*UAlberta Pro-Life v Governors of the UofA*)

2. Governmental Activities
   a. *Likely will not have to analyze this on an exam*
   b. A non-governmental entity that conducts government activities
      i. E.g., implementing a government program or statute
      ii. E.g., Hospital's delivery of medical services per government program (*Eldridge*) → carries out government services based on a government mandate and funding (but… personnel decisions/hiring/firing/everyday running of the hospital is not a governmental activity and therefore, not subject to the Charter)
   c. Charter does not apply to all activities of the entity, just government activities

Grant v Torstar (2009)

Facts	• Reporter Schiller wrote story critical of Grant's golf course development • Made reasonable efforts to verify claims • Grant sued for libel
Analysis	• Competing values animating libel law → reputation and privacy vs Charter value of free expression (democracy/truth seeking) • Evolution of CL required → new defense: reasonable communication on matters of public interest
Conclusion	• New trial ordered • Court revised CL → when creating new CL rules, the court should do so with Charter values in mind (even though the Charter doesn't actually apply to private matters)
Notes	• Hypothetically, if the government of the time did not like this new CL rule, they could create new legislation to change it; however, this legislation would be subject to the Charter or the notwithstanding clause would need to be utilized

Freedom of Religion (Anti-Coercion)

Religious Freedom So Far:

- Federalism
  - *Saumur* (1953)
    - Quebec City Bylaw required permission to distribute leaflets in the street (aim: target the Jehova Witnesses)
    - Pith & Substance: regulation of religious speech
    - NOT local (NOT targeting local issue) → local law targeting a religious community has implications over entire country
    - *Ultra vires* - could be morality legislation created by the federal government
    - Issue: this approach of finding things fed in nature does not limit intrusion on religious freedom by the fed govt (does not actually prevent ANY religious freedom infringement … just doesn't allow the prov govt to do so)
  - *Indian Act*, valid under 91(24), focus on cultural assimilation (*intra vires*)
    - Ban of religious practices (potlatch)/res schools → shows fed govt can infringe on religious freedom without the *Charter*
- Federalism and Lord's Day Legislation
  - Ontario Act to Prevent the Profanation of the Lord's Day
    - Forbade and punished "worldly labour, business or work" on Sundays
    - *Ultra vires* (intrusion on federal criminal law power)
  - Federal Lord's Day Act, 1906
    - Forbade and punished work on Sunday (exceptions for necessity, mercy, etc.)
    - *Intra vires* federal criminal law power (repeatedly upheld as valid federal criminal law)
      - Explicit aim of law (per Laurier): make "positive law" enforcing "moral" and "divine law" (not a secret intention)
      - Religious purpose essential to validity (per Laskin, in commentary) → if it was a law about regulating labour, it would be ultra vires the federal government because it is a provincial responsibility

Enter the *Charter* (1982)

- Freedom of Religion
  - S. 2 Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion
- Multicultural Heritage (interpretive provision → when interpreting s. 2(a) we must interpret it in a manner …)
  - S. 27: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians"

2(a) *Edwards - Amselem* Framework:

- Interpretive provisions (i.e., s. 27)
- Freedom of Religion (s. 2(a))
  - Infringing Purpose
    - E.g., coerce religious observance (*Big M*)
    - Purpose doesn't "shift" even if the effects change (*Big M*)
  - Infringing Effect
    - 1) Sincerely held belief (*Amselem*)
      - Connection with divine, function of spiritual faith
      - Official dogma not dispositive
      - Sincere belief = not fictitious, artificial, capricious
      - (Looking to see claimant sincerely holds a belief; however, EXCEPTION is the Church of the Flying Spaghetti Monster … wry political humour/mockery of religion does not = sincerely held belief)
      - QUESTION OF FACT: do the facts show sincerity? BUT, not appropriate to rigorously study past practices of claimant
    - 2) Burden on practice not "trivial or insubstantial" (*Edwards*)
      - Direct or indirect
      - Action or inaction
      - More than mere coincidence/overlap with religion
    - Look at the impact on claimant and not the intention of the government
    - Law as "subtle and constant reminder" of "difference" and "alienation"
- Infringements may be justified under s. 1
  - Laws with infringing purpose typically do not have a pressing and substantial objective
  - However, laws with infringing effects may have a justifiable (pressing and substantial) purpose

RELIGIOUS COERCION: Laws that coerce observance of religion ("freedom from" religion)

Big M Drug Mart

Facts	• Big M charged with unlawfully carrying on sale of goods on a Sunday - contrary to *Lord's Day Act* • *Charter* raised (*Charter* prevents this law from operating even though it previously withstood federalism claims) • Constitutionality of Act challenged in terms of division of powers and *Charter*
Issue	• Is the *Act* overtly religious or does it have a secular interpretation? (Is there a rights infringement?)
Rule	• Purpose of an *Act* is frozen in time - not subject to "living tree" interpretation even if effects of law change

Analysis	Infringement of s. 2(a)
	• Purpose of *Act*: compulsion of sabbatical observance
	  ○ Religious purpose in connection with fourth holy commandment well established
	  ○ "The guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others" (Dickson CJ)
	  ○ Takes religious values rooted in Christian morality and uses the fore of the state to translate the values into positive law binding on everyone
	  ○ State cannot use criminal sanction to achieve religious purpose
	Justification under s. 1
	• Objective: compelling religious observance
	  ○ Not pressing and substantial
	  ○ Secular justification - everyone deserves a universal day of rest from work/business/labour
	  ○ However, a religious objective is essential to the validity of the law - needs to be religious or cannot be upheld because if the purpose was the secular goal of enforcing day of rest, the *Act* would fall under s. 92(13)

Conclusion	● Freedom of religion infringed ● The Constitution is a living tree but the *Lord's Day Act* is not ● Remedy: Declaration of invalidity (s. 52) - law no force or effect (struck down)

R v Edwards Books

Facts	● *Act* makes it an offence to carry on a retail business on a holiday (including Sundays) → can be fined ○ Exception for stores with 7 or less employees, less than 5000 square feet, and closed previous Saturday
Rule	● Even if the impugned act does not have an infringing purpose, it can still infringe rights if there is an infringing **effect**
Analysis	**Purpose** ● Evidence (intrinsic and extrinsic) ○ Ontario Law Reform Commission Report re. Sunday Closing Laws → this law is not like law in B*ig M* ○ Conclusion: uniform holidays for retail workers (secular, permissible purpose) → not a *Charter* infringing purpose **Effect** ● "Coercive burdens on the exercise of religious beliefs" ○ Emphasis on the claimant's perspective - was there any burden on religious freedoms? (regardless of whether the government intended to or not - indirect/unforeseeable effects still infringing) ○ But "trivial and insubstantial" burdens are alright (i.e., sales tax on religious candles OK) ○ And mere coincidence between law + majority faith does not violate s. 2(a) (i.e., criminalizing murder is OK) ○ Here, law burdens Saturday Sabbatarians (there is a serious burden - not insubstantial) because you must be closed Sunday AND Saturday ■ "natural" disadvantage (Saturday closure) remains AND "new, purely statutory disadvantage" of Sunday closure added **Justification (Oakes)** ● Pressing and substantial objective present ○ Protect retail workers with a common day of rest ● Proportionality ○ Rational connection present ○ Minimal impairment met ■ Alternative means not feasible ● Right of workers to refuse Sunday work? But insufficient concern for vulnerability of workers ● Broader exemption to close on Sat instead of Sun? But it is undignified for the state to inquire into the sincerity of individual's beliefs/internal integrity (respect for claimant) ■ Law represents a reasonable choice (maybe not the best choice, but it is reasonable) ● Employee exemption (7 or less) not a magic number but is reasonable ● Court will not dictate where legislature should draw the precise line when they have made a reasonable choice ● Doesn't need to be the least infringing alternative (the court will look at whether alternatives were considered and reasonable choices made) ○ Proportionate effects test - "little difficulty" to satisfy
Conclusion	● Infringement made out but law justified under s. 1

RELIGIOUS ACCOMMODATION: Laws that burden religious practice ("freedom to" religion)

Amselem

Facts	● Condo association refuses to permit Orthodox Jewish unit owners to construct "succahs" (huts) on their balconies ● Claimants believe an individual succah is necessary ● *Charter* does not apply – restriction imposed by non-state actor ● However, *Quebec Charter of Human Rights and Freedoms* is in play
Analysis	● Freedom of religion includes freedom to partake in practices/beliefs that have a nexus with religion, where individual demonstrates sincere belief in his faith

	• Courts *should not* inquire as to validity/veracity of practices (all that matters is what individual considers to be his religious obligations – consistency with religious experts does not matter) • Courts *can* inquire to sincerity of belief (limited inquiry to ensure belief is honest + not capricious, artificial, fictitious) • Once individual has shown that religious freedom is triggered, court must determine whether there has been enough of an interference to constitute an infringement of the Quebec or Canadian *Charter* • Impairment of religious freedom is serious whereas intrusion on condo rights is minimal (cannot justify limits on exercise of religious freedom) • The principles applicable in cases where an individual alleges that freedom of religion infringed under QC *Charter* are ALSO applicable to a claim under s. 2(a) of the Canadian *Charter* Here: • Claimants believe individual succah necessary ⟶ question is **sincere belief**, not official doctrine • Belief burdened – difficult/distressing to dwell for 9 days in communal or relatives' succah • Minor inconvenience to other residents
Conclusion	• Bylaw infringes QC *Charter* and is not justified

Multani v Commission scolaire Marguerite-Bourgeoys

Facts	• Quebec school board forbade all weapons in school • School board's decision to ban a Sikh student from wearing a kirpan (dagger) to school as required by his religion • Student believed religion required he wear kirpan

Analysis	• 2(a) Infringement?
	  ○ Prohibition of weapons in schools applied to prevent Sikh student from wearing kirpan who believed his religion required he wear the kirpan (sincere belief and nexus met)
	  ○ Decision substantially burdened sincere belief
	• Justification?
	  ○ Objective: ensure "reasonable safety" at school for students and teachers (aim is NOT perfect safety)
	  ○ Reasonable to ban kirpan? No ⟶ other potentially dangerous objects not banned, no known incidents of Sikh students drawing kirpan at school, and kirpan could be sewn into clothes/minimizing risk (alternative option)
	  ■ Anytime a claimant can show the government could achieve their objective with a less intrusive means strengthens the argument that the *Charter* rights were infringed

Conclusion	• School board decision infringes s. 2(a) of the *Charter* and is not justified under s. 1
Notes	• This case uses the Oakes analysis ⟶ today we would use the Dore analysis

Hutterian Brethren

Facts	• 1974-2003: "Condition Code G" exemption (allowed some people to get a license without a photo) • 2003: exemption removed ⟶ Hutterian Brethren refuse to be photographed (second commandment violation)

Analysis	Infringement? (s. 2(a))
	• Infringement present - Brethren has a sincerely held belief in their practice that has a nexus with religion
	• Requirement to have photograph taken represents a non-trivial interference or burden with their ability to act in accordance with their beliefs
	Justified? (s. 1)
	• Pressing & Substantial: ensuring integrity of system to prevent ID theft and harmonize with other jurisdictions
	• Proportionality
	  ○ Rational connection present between limit and purpose of law
	  ■ Universal system of photos for drivers is more effective in preventing identity theft than exemptions
	  ■ If your aim is to be comprehensive in preventing identity theft, an exception can be exploited and utilized for fraudulent purposes
	  ○ Minimal impairment present
	  ■ Courts should not "read down" government's objective (e.g., should not say the government should have had a lower standard of safety)
	  ■ Courts should not be "unrealistically exacting or precise" when determining law's objective so as to immunize the law from review/make it impossible to examine alternatives

	■ There are no alternatives that substantially fulfill objective while allowing claimants to avoid photo ■ Here, lack of photos in database would "significantly compromise" government's objective of a "maximally efficient photo recognition system" to combat fraud ● Comparison to *Multani* → here, the government isn't trying to create "reasonably secure," they are trying to create "maximally efficient" ○ Proportionate effects present ■ Salutary effects: enhances security of licencing system / assures license corresponds with individual and nobody has more than one license (supports "maximally efficient") ■ Deleterious effects: minimal because colony can arrange third-party highway transport, driving is a privilege not a right / not as bad as *Multani* or *Amselem* (claimants here have effective choices) ■ Limit serves public benefit and does not deprive membres of ability to live in accordance w beliefs **DISSENT (Abella J)** ● Minimal impairment not present ○ No "cogent or persuasive evidence" exemption would interfere with government objective ○ No evidence of fraud → government hasn't brought forward anything except their fears ● No proportionate effects ○ Salutary Effects ■ Facial recognition technology not foolproof ■ No evidence of problems with Code G licenses (no evidence of exploitation for fraudulent aims) ■ Small number of observers (doesn't pose an extremely large threat) ○ Deleterious Effects ■ Not driving not a "meaningful choice" in rural Alberta ■ Driving as "privilege" inconsistent w case law (*Roncarelli*: ability to have a liquor license protected)
Conclusion	● Section 2(a) infringed, justified under section 1 ● (leading s. 1 case)

Ktunaxa Nation v BC

Facts	● Glacier Resorts wanted to build a year-round ski resort on Ktunaxa land ● Ktunaxa took position that permanent structures would drive the Grizzly Bear Spirit from their land and impair their religious beliefs and practices ○ Spirit is central to their religious beliefs and its departure would render their practices futile ● Minister approved development agreement despite Ktunaxa's position
Analysis	MAJORITY: Freedom of Religion NOT engaged ● Infringement ○ Sincere belief established ○ But government action does not interfere with their ability to believe or manifest their beliefs ○ There is no state duty to "protect the object of beliefs" but instead to protect freedom to hold beliefs and worship them ■ State protects freedom to worship but not focal point of worship ■ CRITIQUE 1: hasn't the SCC protected the object of beliefs before? E.g., the kirpan ○ Ktunaxa are not seeking freedom to believe in Grizzly Bear Spirit or to pursue activities related to their belief, rather they seek to protect the spirit itself and the subjective meaning they derive from it (this is beyond the scope of s. 2(a) because it would require Courts to put deeply held personal beliefs under judicial scrutiny) CONCURRING (Moldaver J): Rights engaged ● Indigenous spirituality → Indigenous spirituality treated differently than Jeudo-Christian religions ○ CRITIQUE 2: excludes people who are frequently excluded from doctrine ● Divine not supernatural, but linked to physical world ● "Religious significance" protected ○ Meaningful religious protection should be responsive to different types of religions and places/objects may have "religious significance" → unless justified with Dore or Oakes framework ● However, Moldaver J concurs with the result (just wants to highlight different points/draw different conclusions) ○ Statutory objectives: administration of crown lands, disposal of lands in public interest, encouraging outdoor recreation ○ Decision infringed rights as little as possible in light of objectives

Conclusion	• No infringement made out
Notes	• Even though they lost in court, now, many years later, this area is protected land (turned over to Ktunaxa jurisdiction) ○ Federalism → decision to protect the land reached between fed and prov government (and Ktunaxa people)

Law Society of BC v Trinity Western University (TWU)

Facts	• TWU(Christian uni) wanted to open a law school requiring students/faculty to comply with a religious code (mandatory covenant) that prohibits sexual intimacy that violates sacredness of marriage between a man and woman • Law Society of British Columbia (LSBC) would not recognize TWU's law school - statutory mandate is diversity and equal access to the legal profession

Analysis	MAJORITY
	• Sincere belief established (that studying in a religious environment helps spiritual growth when governed by strict set of religious rules)
	• Interference made out ("interfered with TWU's ability to maintain an approved law school" in line with beliefs)
	• Proportionate balancing
	  ○ No religious "requirement" - infringement is minor - students can go to a different law school
	  ○ Public confidence in the administration of justice is undermined if the LSBC approves a law school that bars LGBTQ individuals from attending
	  ○ Religious practice that impacts others/injures others can be limited
	  ○ Denial of approval is not a serious limitation on religious rights of members of TWU community
	CONCURRING (Rowe)
	• Sincere religious belief?
	  ○ Not mandatory, so not covered by s. 2(a)
	  ○ No obligatory religious practice to go to school with people who agree with you … but even if there is, it still fails because (interference info below)
	• Interference
	  ○ Precedents all involve freedom from coercion/constraint
	  ○ Communal aspect, but individual right
	  ■ What if communal aspect was more "essential" to individual subjective beliefs
	  ○ 2(a) does NOT protect faith community's efforts to impose beliefs
	  ■ Freedom of religion doesn't protect requiring individuals in law school to sign a covenant

Conclusion	• Law Society's decision is justified given it is a reasonable balance between the statutory objectives

Freedom of Expression

S. 2(b): freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

Irwin Toy 2(b) Framework

Infringement Test

1) Was the P's activity within the sphere of conduct protected by freedom of expression?

- Scope of 2(b): protects activity that conveys or attempts to convey meaning
  - Very broad scope
  - "purely physical" conduct or violent conduct or threats of violence not protected (*Khawaja*), "expressive" conduct protected
  - Sometimes the same conduct may be purely physical and sometimes expressive

2) Was the purpose or effect of the government action to restrict or compel (*RJR*) expression? (most cases have infringing purpose)

- If *purpose* is to restrict content, 2(b) infringed (look at if the law aiming to restrict words/content)
  - No infringing purpose if purpose relates only to physical consequences (e.g., rule prohibiting leafletting versus rule prohibiting littering)
- Infringing effect: impact on purposes of guarantee of 2(b)
  - Pursuit of **truth** (marketplace of ideas)
  - Participation in community (**democratic** rationale, should be able to share opinion, express self)
  - **Self-fulfillment/self-realization** (human flourishing)

Summary: s. 1 in s. 2(b)

- "Prescribed by law"
  - Intelligible standard → government needs to be clear about what the law does/does not cover
  - Not confusing or contradictory (*Irwin Toy*)

- Pressing and substantial objective
    - Level of generality (*RJR*)
    - "You had to have a good reason test"
    - Rest of the analysis always relates back to the objective
- Rational connection
    - "Logic" and "reason" (*RJR*)
    - The more broad, the more alternatives may be present → specifically define the objective (don't just say the objective is to stop smoking)
- Minimal impairment
    - Reasonable basis, on the evidence, for concluding minimally impairing (*Irwin Toy*)
    - Government came to a reasonable conclusion that this would be the least impairing way to achieve the objective (doesn't need to be the absolutely least impairing option … just a reasonable basis for the government to conclude this)
    - Total bans (*RJR*)
- Proportionate effects
    - Loss of profits (*Irwin Toy*)
    - BUT
    - *Commercial* does not mean necessarily "low value" under s. 1 (*RJR*)
    - Consider: was it worth it? (salutary vs deleterious effects)

Irwin Toy

Facts	● Quebec Consumer Protection Act - Prohibited all advertising to kids under 13 years old ○ Factors to see if directed at kids: nature/purpose of goods, manner of presentation, time/place, exemptions. ● Irwin Toy found to have violated the Act → *Charter* argument about whole Act (not just this one violation)
Analysis	Federalism Issues: ● Law is *Intra vires* as consumer protection legislation ● Interjurisdictional Immunity: Law NOT inapplicable as impairing federal telecommunications MAJORITY: **2(b) Infringement? Yes** ● Is the advertising within the scope of s. 2(b)? Yes, the advertising aims to convey a meaning ● Was the purpose/effect of the government action to restrict expression? Yes - purpose was to prohibit particular context of expression in name of protecting children ○ Infringing Purpose? ■ If *purpose* is to restrict content, 2(b) is infringed (e.g., law aims at words/content) ● Court is more open to justifying 2(b) than 2(a) ■ No infringing purpose if purpose relates *only to* physical consequences ● E.g., parking ban or rule prohibiting leafleting vs rule prohibiting litter (could still have an infringing effect) ○ Infringing Effect? ■ Impact on purposes of section 2(b) guarantee ● 1.) Pursuit of truth → "Marketplace of ideas" ● 2.) Participation in Community → "Democratic Rationale" ● 3.) Self-Fulfillment → "Human Flourishing **Justification (Oakes)** ● Are the limits prescribed by law? Yes ○ Law permits some discretion in applying factors ○ Discretion allowed in determining whether the law targets children ○ The law has a definition of the limitations (ages, kinds of advertisements) ○ Court analyzes limitations to see if discretion of government in imposing theme is reasonable ○ Law is not confusing, not contradictory and is intelligible ● Pressing and substantial objective is present ○ Objective: protection of children from advertising ■ Concern is to protect a group vulnerable to manipulation in advertising (kids 2-6y are vulnerable to manipulation by ads → evidence less strong for 7-13y old but not for the Court to 2nd guess the legislature's decision where it is reasonable and involves weighing conflicting evidence) ○ "If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess"

	■ Powerful obiter expressing when the court will likely give deference to Parliament ● Proportionality ○ Rational connection satisfied ■ Something is dangerous → banning the danger ○ Minimal impairment satisfied ■ Court is somewhat forgiving/flexible with the government (doesn't need to show it was the absolutely least intrusive method) ■ Don't need to consider every single other alternative ■ *Charter* was not created to hold back legislation intended to protect vulnerable groups ■ Alternative rejected: industry self-regulation not appropriate, Court will not require legislatures to choose the least ambitious means to protect vulnerable groups (*Edwards*) ○ Proportionate effects ■ Deleterious effects not severe - advertisers can adopt strategies to direct messages at adults ● Advertisers can partake in educational advertising ● "[A]dvertisers will have to develop new marketing strategies" (Court isn't too worried about that harm) DISSENT (McIntyre with Beetz): Expression should only be limited in "urgent" and "compelling" circumstances, and only to the "extent" and "time" necessary to protect community (dissent wants expression only limited in emergencies)
Conclusion	● Infringement of 2(b) recognized but justified under s. 1

RJR MacDonald

Facts	● Federal *Tobacco Products control Act* required health warnings on all tobacco products sold in Canada ● Prohibited advertising tobacco and required "unattributed" warnings ● Government conceded that s. 2(b) Charter infringed
Analysis	Federalism: *Intra vires* exercise of criminal law power ***Charter* questions:** ● Prohibitions on **advertising** = 2(b) infringement conceded ○ Literally aimed at words ● **Warning labels** (right to say nothing) and prohibition on additional content exacerbates infringement (s. 2(b) infringement found ○ Still aimed at words/compelling words to be said is still an infringement **Justification:** ● Pressing and substantial objective met (not overly broad) ○ Advertising ban: prevent people from being persuaded to smoke by advertising ○ Warning label: discourage people who see package from smoking ● Proportionality ○ Rational connection met ■ Can use reason/logic rather than direct proof ■ Exception: prohibition on use of logos on non-tobacco products ○ Minimal impairment → FAILS ■ Complete prohibition only acceptable where proven that partial ban would be less effective ■ Here, no evidence/argument for foregoing lesser advertising restrictions ● Could have banned lifestyle advertising rather than informational ● Could have excluded brand preference ads ● Could have used more tailored schemes directed at certain group or time of day (*Irwin Toy*) ● Failure to produce evidence of government's inquiry into alternatives ■ Government failure to prove that unattributed warnings were needed ● E.g., U.S. "Surgeon General's" warning → why didn't Canada do this? No evidence ○ Proportionate effects: not considered because minimal impairment not met **Commercial Speech Notes:** ● Majority: Do not "undervalue" commercial expression ○ Profit motive irrelevant to whether expression "core" (e.g., book sellers) ● Dissent: Speech in this case serves no political, scientific, or artistic ends

	○ Harms of smoking and profit motive place this form of expression "as far from the 'core' of freedom of expression values as prostitution, hate mongering, or pornography, and thus entitle it to a very low degree of protection under s. 1" **Deference / Institutional Competence Notes:** ● Majority: "Courts must … insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning" ● Dissent: "Courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interest and to reach out and protect vulnerable groups" ○ Fear of "paralyzing the operation of government" ○ Legislatures are better suited to express the will of the democratic majority than the courts
Conclusion	● Infringed s. 2(b) and NOT justified under s. 1

JTI-MacDonald

Facts	● Federal *Tobacco Control Act*, 1997 prohibited tobacco advertising ○ Exceptions for "informational advertising" and "brand preference" advertising ○ Warning attributed to government
Analysis	Justification ● Government presented "copious evidence" to justify limits ● Strong national and international attention to smoking suppression → socio legal change in the court's willingness to hear these arguments ● Scheme represents "a genuine attempt by Parliament to craft controls on advertising and promotion that would meet its objectives" and protect s. 2(b) interests
Conclusion	● Law infringed s. 2(b) but upheld under s. 1

Keegstra -1990

Facts	● CC s. 319: offence to wilfully promote hated against any identifiable group through statements ● Keegstra was a high school teacher convicted of wilful promotion of hatred for comments made in class (anti-semite)
Analysis	**Infringement** ● 1) Expression/statement conveys a meaning → it is beside the point that words are obnoxious and invidious ● 2) Purpose/effects of the law intend to prevent expression (infringing purpose) → law "aims directly at words" **Justification** ● Pressing and substantial objective met ○ Objective is to prevent the pain suffered by target group members ○ Cohen Committee and *Equality Now!* - substantial presence of hate speech that causes "very real harm" ○ International attention to problem of hate speech (*CERD*, *ICCPR*) causes harm on listeners ○ ss. 15 and 27 of the *Charter* - must remember equality and multiculturalism ● Low connection between expression and 2(b) ○ Truth seeking: hate speech not likely to be true (hate speech is often factually inaccurate) ○ Law limits self-fulfillment of speakers BUT protects target groups as hate speech harms their self-fulfillment ○ Democratic processes: definitely political speech but undermines democratic values ● Proportionality ○ Rational connection: established ■ Dissent (McLachlin): concern that people may view Keegstra as a hero for standing up for these hateful views - increasing hate (but not based on any evidence, just an instinct) ■ Majority: effect of laws hard to define with exact precision, but trial and media attention can serve to illustrate public reprobation (Canadians will not sympathize with propagators of hate speech) ○ Minimal impairment ■ Argument: law is overbroad and vague ● Captures unpopular or unconventional communications that pose no risk of harm

	● CC offence does not require proof that speaker caused actual hatred ■ Evidence that gov tried to narrow the scope of the law ● Private conversations excluded, requires wilful communication, defences available ■ Court provided judicial definition of hatred ● Court layered on a narrower interpretation of hatred because there is a presumption of the constitutionality of legislation when conducting statutory interpretation ■ Prior overzealous application of the law does not invalidate the law ■ Alternatives insufficient: human rights law/civil remedies don't achieve govt goals in same way ○ Proportionate effects ■ Deleterious effects: minimal engagement with free expression values ■ Salutary effects: importance of objective is justified in this case
Conclusion	● Law infringed s. 2(b) but justified under s. 1

Zundel (Keegstra Postscript) - 1992

Facts	● CC s. 181 - wilful publication of false news ● Holocaust denier charged under "false speech provision"
Analysis	● SCC: deliberate publication of false statements is protected under s. 2(b) ● BUT there is no pressing and substantial objective of the section ○ Aim of the law is to protect the mighty and the powerful from discord or slander ○ And even if the aim was promotion tolerance, the law is not minimally impairing of s. 2(b) → can't interpret "false" in the same way as "hatred") ○ Law is also overbroad and could be used to prosecute unpopular ideas ● NOT justified under s. 1 ○ LAw has no pressing/substantial objective ○ Even if it did, not minimally impairing
Conclusion	● Different outcome from *Keegstra* - false statements protected under 2(b) (law infringes and is not justified)

Butler

Facts	● *CC* 163(1): possession/circulation of obscene things ● *CC* 163(8): defines obscenity (undue exploitation of sex) ● Butler sold porn + charged with distribution of obscene material
Analysis	● "Empirically, **all pornography is made under conditions of inequality based on sex** "(Catharine A. MacKinnon) ○ The freedom to express claimed by pornographers comes at the extent of an infringement on women's freedom of expression **Infringement (s. 2(b)) present in light of *Keegstra*** ● Obscene material is expressive – not purely physical ● Infringing purpose: restrict expression **Justification (s. 1)** ● Prescribed by law: ○ Does "undue (exploitation of sex)" provide an intelligible standard (*Irwin Toy*)? Yes. ○ Court defines meaning of undue: community standard of tolerance (*Brodie*, 1962) ○ Note: just like how the court added more parameters to the word "hatred" in *Keegstra*, adding meaning of "undue" was necessary for the outcome of the analysis ○ Critique: adding interpretive parameters later to narrow doesn't allow citizens to be informed on standards ● Pressing and substantial objective met ○ "Avoidance of harm resulting from … exposure to obscene material" or state as "moral custodian in sexual matters" ○ Here, shift in emphasis within purpose of law: even though emphasis on criminal sanction might have some moral emphasis, it has shifted to have more of a harm/protecting from harm purpose ■ Technically, purpose of law cannot shift as per *Big M* but court avoids this and says it is not the purpose that has shifted but rather the emphasis ● Proportionality

	○ Rational connection met ■ Reasonable to presume link between exposure and harm ○ Minimal impairment met ■ Scheme need not be perfect, just appropriately tailored ■ Narrowed definition, focus on public distribution (this is a well tailored law) ■ Alternatives: educational initiatives insufficient ○ Proportionate effects met ■ Deleterious effects: minimal because porn is not political speech/core speech, aim of porn is profit ■ Salutary effects: objective of avoiding harm is fundamentally important (benefits outweigh harms)
Conclusion	● Law infringes s. 2(b) but law is justified

SECTION 7

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

- Significant internal limit
- Can be deprived if it accords with the principles of fundamental justice

Two-Step Framework (*Re BC Motor Vehicle Act*)

1) Section 7 interest engaged (life, liberty, security of the person)?

- Liberty: deeply personal choices (*Malmo-Levine* and *Morgentaler*)
- Liberty: possibility of imprisonment (*Malmo-Levine* and *Re BC Motor Vehicles*)
- Security of the person: physical and psychological integrity (*Morgentaler* and *Insite*)

2) Violation of a principle of fundamental justice?

- PFJs: legal principle of sufficient societal consensus that can be identified with sufficient precision against which to measure deprivations of section 7 (life, liberty, security of person) interests (*Malmo-Levine*)
- Overbreadth (*Bedford*)
  - No connection between the law's objective and some but not all of its impacts
- Arbitrariness (*Bedford*)
  - No connection to the law's objective
- Gross disproportionality (*Bedford*)
  - Deprivation totally out of sync with law's objective
  - "Preservation of life" way too general/broad (*Carter*)
  - "To make Canada a better place" is too broad but "to make a law that says [insert text of law]" is too specific
- No imprisonment without fault (*Re BC Motor Vehicles*)
- Defences cannot be illusory (*Morgentaler*)
- NOT the harm principle (*Malmo-Levine*)
- Vagueness (*Prostitution Reference*)
- *Charter* ss. 8-14 (*Re BC Motor Vehicle Act*)
  - 8. Everyone has the right to be secure against unreasonable search or seizure.
  - 9. Everyone has the right not to be arbitrarily detained or imprisoned.
  - 10. Everyone has the right on arrest or detention to be informed promptly of the reasons therefor; to retain and instruct counsel without delay and to be informed of that right; and to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.
  - 11. Any person charged with an offence has the right: to be informed without unreasonable delay of the specific offence; to be tried within a reasonable time; not to be compelled to be a witness in proceedings against that person in respect of the offence; to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; not to be denied reasonable bail without just cause; except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.
  - 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

- 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.
- 14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

S. 1 Justification (exceedingly difficult for the government to justify because of the overlap)

- Arbitrariness → rational connection
- Overbreadth → minimal impairment
- Gross disproportionality → proportionate effects
- Critique: does this displace the burden from the Crown to a claimant to prove that the law cannot be "justified" because proving a s. 7 infringement effectively requires disproving the 2nd prong of Oakes test/proportionality (which is the second prong of the s. 1 analysis)

Re BC Motor Vehicle Act

Facts	• Fine/imprisonment for driving w/ suspended license • Guilty even if unaware of suspension (absolute liability)
Issue	• Violation of s. 7?
Analysis	• Liberty interest engaged because of possibility of imprisonment • PFJ: morally innocent should not be punished - PFJ is violated • Section 1 justification: no reason to not include the defence of due diligence, not justified
Conclusion	• Violation of s. 7 interests, not justified

R v Malmo-Levine

Facts	• Narcotic Control Act prohibited possession of marijuana and Malmo-Levine charged with possession • Argued that the possibility of imprisonment for possession engages his s. 7 right to liberty, infringement not in accordance with PFJs

Analysis	• Section 7 interest engaged?
	  ○ No liberty interest in smoking marijuana but possibility of imprisonment engages liberty interest
	• Violation of PFJ?
	  ○ Harm principle is NOT a PFJ - insufficient societal consensus around its status as a legal principle and too vague to serve as a clear standard to measure deprivations of s. 7 interests
	  ○ Arbitrary: prohibition is not arbitrary because of potential harms to others when user engages in its activities
	  ○ Grossly disproportionate: effects of potential imprisonment fall within broad latitude granted to government

Conclusion	• Law does not infringe s. 7, harm principle is NOT a principle of fundamental justice

R v Morgentaler

Facts	• Section 251 *CC* forces a woman by threat of criminal sanction to carry a fetus to term – criminalizes abortion, 2y jail • Exception for when abortion protects life/health of pregnant woman ○ Available only with approval of a three-doctor committee/serious procedural and administrative obstacles • Morgentaler opened Toronto clinic that performed abortions without committee approval

Analysis	**Majority**
	• Section 7 interest engaged?
	  ○ Security of person engaged – state interference with bodily integrity from physical risks from inability to control treatment of abortion
	  ○ Serious state-imposed psychological stress of forced pregnancy and emotional stress from uncertainty
	• PFJs violated?
	  ○ Yes → scheme w criminal punishment but illusory defence
	  ○ Defences available to people who performed abortion were not practically viable (delays)
	• Justification under s. 1?
	  ○ Proportionate effects fails + minimal impairment fails (illusory means rights impaired more than necessary)
	• Conclusion: "assuming" parliament may restrict access to abortion, it must do so properly

	○ (Doesn't address whether abortion can be limited in other circumstances) ○ Access must be concrete, viable: quicker procedures, easier access to procedures, less bureaucracy **Wilson J concurring** ● Main issue is liberty ○ Can a pregnant woman be compelled by law to carry the fetus to term? ● Liberty interest engaged ○ Human dignity, respect for personal autonomy over important decisions intimately affecting private lives ○ Decision to abort comes within this class of protected decisions (life/health/economic/psychological/social) ● Infringes section 7 even if procedural issues resolved ● Section 1 justification ○ Law not tailored to achieve objectives ○ Removes decision at all stages of pregnancy – autonomy, capacity to choose ● "It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience" **McIntyre & LaForest (dissenting)** ● Section 7 does not guarantee the right to have an abortion (s. 7 right not infringed) ● History, traditions and underlying philosophies of our society would not support the proposition that a right to abortion could be implied in the Charter
Conclusion	● Majority decision does not eliminate possibility of Parliament criminalizing abortion in the future ● Would have to comply with procedural elements

Aftermath of *Morgentaler*

- *Borowskiv Canada:* challenged CC s. 251 as insufficiently protecting life of fetus but CA said fetus is not an "everyone" under s. 7
- Various bills re-criminalize abortion (never passed), NS law seeking to restrict, unequal access, etc.
- Technically, the federal govt can legislate/ban abortion but the provincial govt cannot (federal criminal law power) → but questions about this legislation would still be raised and considered by courts

PHS Community Services

Facts	● *Insite* operated safe injection site ● ss. 4(1) and 5(1) possession and trafficking of drugs prohibited by *Controlled Drugs & Substances Act*
Analysis	**ss. 4(1) and 5(1) of the *CDSA*** ● Engagement w s. 7 interest? ○ Only engaged by possession provision: engages life, liberty and security of the person ○ Canada's argument of personal choice rejected – addiction is a disease ○ Morality of activity and Canada's policy choices irrelevant at this stage ● Violation of PFJs? ○ Not an arbitrary law – governments make decisions about criminal and health policies **Minister's decision to reject application for exemption from provisions of CDSA** ● Engagement w s. 7 interest? ○ Life, liberty and security engaged ● Violation of PFJs? ○ Decision is arbitrary: undermines objective of protection of health and public safety ○ Decision is grossly disproportionate: negative effects of denial outweigh (any) benefits of the prohibition ○ Decision is overbroad **Section 1 justification (*obiter*)** ● Refusal of minister bears no relation to the objectives of the law ● Exemption does not undermine rule of law ● Even if we were to justify the decision, we would not find it to be justified
Conclusion	● Decision of minister infringed s. 7 and not justified

Bedford (2013)

Facts	• Sections of the CC criminalize various activities related to prostitution
	  ○ s. 210: prohibition on bawdy house (place used for sex work)
	  ○ s. 212(1)(j): prohibition on living off the avails
	  ○ s. 213(1)(c): prohibition on communicating in public for purposes of prostitution
	• Current/former sex workers challenging sections because they put their safety/lives at risk
	• *Prostitution Reference* says vagueness is a PFJ but the bawdy house/comms provisions are not impermissibly vague

Analysis	Role of Precedents – TJ not bound by precedent if:
	• 1.) New legal issues not raised in prior case
	  ○ Here: prior case only grounded in liberty interest, now security of the person
	• 2.) Significant developments in law
	  ○ Here: developments are definition of arbitrariness, overbreadth and gross disproportionality
	• 3.) Change in circumstances or evidence that fundamentally shifts parameters of debate (see: *Carter*)
	Provisions infringe s. 7 rights by depriving prostitutes of security of the person
	• Provisions heighten the risks and impose dangerous conditions on sex work
	  ○ Bawdy House Provision → increases to street sex work and outlawing safe houses)
	  ○ Avails Provision → aimed at pimps but also targeted bodyguards, drivers, and other protectors
	  ○ Communication Provision → precludes face-to-face communication
	• Does CC **CAUSE** these risks?
	  ○ AG: choice to engage in risky activity (risks of violence are part of the work of prostitution)
	  ○ SCC: lack of "meaningful choice" (many people aren't prostitutes out of choice)
	  ○ Provisions make lawful activity more dangerous (like preventing cyclist from wearing helmet)
	  ○ Violence of a john does not diminish role of state in making prostitute more vulnerable to that violence
	• No accordance with PFJs
	  ○ Negative impact of bawdy house provision is grossly disproportionate to achieve the objective of preventing public nuisance or neighbourhood disruption
	  ■ "A law that prevents street prostitutes from resorting to a safe haven such as Grandma's House while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose"
	  ■ Few complaints re indoor prostitution compared to high homicide rates of prostitutes
	  ■ Prevents indoor sex work and ncreases street prostitution or "out calls" which is most dangerous
	  ■ Parl can regulate against public nuisances but not at the cost of health/safety/lives of prostitutes
	  ○ Living off avails is overbroad to achieve the objective defined by the court of targeting "pimps and the parasitic, exploitative conduct in which they engage"
	  ■ Even though the AG said their objective was "to target the commercialization of prostitution, and to promote the values of dignity and equality" the Court redefined the objective
	  ■ Does not distinguish between those who exploit prostitutes and those who increase their safety
	  ○ Negative impact of communicating prohibition is grossly disproportionate to objective of obtaining public order and preventing nuisances by taking sex work out of public view
	  ■ Prostitutes prevented from screening clients for intoxication, propensity to violence face-to-face
	  ■ Public communication essential to safety
	Not justified
	• No serious s. 1 argument advanced (except "enforcement practicality" of avails provision)
	  ○ Not minimally impairing – encompasses clearly non-exploitative relationships (no exemption available)
	  ○ Deleterious effects: preventing prostitutes from taking measures to increase their safety is not outweighed by law's positive effect of protecting prostitutes from exploitative relationships
	• The s. 1 analysis echoes overbreadth and gross disproportionality analyses

Conclusion	• Section 7 interest engaged, no compliance with PFJs, not justified

New law post-*Bedford*: *Protection of Communities and Exploited Persons Act*

- Preamble took aim at objectification and disproportionate impact on women/children
- Repealed the avails provision and the bawdy house provision
- Communication offence remains
- New offence of obtaining sexual services for consideration but exempts those offering their own sexual services
  - Illegal to purchase sex but not illegal to sell sex (sex worker cannot be incarcerated but "John" (purchaser) could)
  - Blanket exemption for offering provision of one's own sexual services
  - By criminalizing purchasers, this still forces sellers to hide in order to sustain themselves

Carter

Facts	• Section 241(b) CC: anyone who aids/abets person in committing suicide commits indictable offence • Section 14 CC: no person may consent to death being inflicted on them • Provisions prohibit provision of assistance in dying in Canada • In an earlier case *Rodriguez*, court found no s. 7 violation (SCC found here that TJ not bound by *Rodriguez* because of developments in law of overbreadth/gross disproportionality AND changes in facts)

Analysis	**Section 7 engagement?**
	• Right to life engaged where law imposes death or increased risk of death on a person
	  ○ Case law limited to threat of death → "right to life" not expanded to include death w dignity or duty to live
	  ○ Prohibition forces some individuals to take their own lives prematurely for fear they would be incapable of doing so when they reach the point where suffering is intolerable
	• Right to liberty engaged because the choice to die in face of serious illness is "fundamental" (individual's response to medical condition is a matter critical to dignity and autonomy)
	• Right to security of the person engaged because of physical and mental suffering
	Law's objective: according to the court the objective is protecting vulnerable persons from being induced to commit suicide at time of weakness. Broad objective (preservation of life) has potential to short-circuit analysis.
	• Objective should not extend too far beyond provision.
	• Attempting suicide is legal so preservation of life alone cannot be objective, as per AG.
	PFJs
	• NOT arbitrary: object of prohibition is not to preserve life whatever the circumstances, but to protect vulnerable persons form being induced to commit suicide at time of weakness and total ban of assisted suicide helps achieve this goal
	• However, prohibition is overbroad: catches people outside class of protected persons ("vulnerable" individuals is protected class) – prevents people who are informed and free from coercion from committing assisted suicide
	  ○ Limitation on rights is in some cases not connected to objective
	  ○ If law purposely overbroad for enforcement purposes, address under s. 1 (*Bedford*)
	Justification under section 1
	• Limit is prescribed by law (*Irwin Toy*)
	• Law has pressing and substantial objective
	• Prohibition is NOT proportionate to objective
	  ○ Rational connection MET bc prohibiting activity that poses certain risks is rational method of curtailing risks
	  ○ Minimal impairment NOT MET bc blanket prohibition not necessary to substantially meet govts objective
	  ■ Alternative: permissive regime with safeguards can protect vulnerable people from abuse and error
	  • Physicians can reliably assess patient competence
	  • No evidence unconscious bias results in higher risk of assisted suicide for ppl w disability
	  • No evidence prohibition will create slippery slope to condoned murder
	  ■ Echoes overbreadth analysis

Conclusion	• Section 7 infringement and not justified

Section 1 used to address:
- Overbreadth for the purpose of practically enforcing the law (*Bedford*)
- Public good, competing societal interests (*Carter*)

"the right not to be deprived thereof"
- Does this require positive action from the state to protect s. 7 rights?

Gosselin

Facts	• QC gov created new social assistance scheme → s. 29(a) of *Regulation Respecting Social Aid* set base amount of $ payable to ppl < 30 and participation in one education/work exp allowed ppl < 30 to increase payments:
	  ○ Most recipients under 30 years old received less than ⅓ of those over 30
	  ○ 88% of recipients under 30 were unable to achieve the top up
	• Poverty associated w disease, depression and suicide
	• P brought class action challenging scheme on behalf of welfare recipients < 30 – argued that the regime violated s. 7

Analysis	**Majority (McLachlin)** ● Factual record does not support that state deprived her security of person by providing her with < $ violating PFJs ● Purpose of s. 7: protecting life, liberty and security from <u>deprivations by the state</u> – does not extend to requiring state to act ● s. 7 does not only refer to crim law/admin of justice and should be allowed to develop incrementally ● s. 7 does not place positive obligations on the state, rather it restricts state's ability to deprive people of s. 7 rights ● NO deprivation here: no new application of s. 7 for a positive state obligation to guarantee adequate living standards ○ Evidence of actual hardship is insufficient (not enough evidence to warrant a positive obligation) ● Door left open (living tree): one day s. 7 may be interpreted to include positive obligations (in special circumstances) **Dissent (Arbour)** ● s. 7 violated right to security of the person and <u>imposes positive obligation</u> on state to offer basic protection for s. 7 rights ● s. 7 protects right *to* these things AND right to not be *deprived of* them. State must ensure min protection for citizens. ● *Charter* does include positive obligations like the right to vote in s. 3 ● State obligation not contingent on proof the state is causally responsible for the deprivation (existence of *Act* sufficient to trigger application of *Charter*) ● Scheme engages s. 7 – life & security of the person (poverty/associated health risks, impossible to pay rent/ food) ○ "Ample evidence" $170/month cannot meet needs; suicide/drug addiction; resort to theft, prostitution, etc. ● A minimum level of welfare necessary to render s. 7 rights meaningful
Conclusion	● No infringement
Note	● Even though McLachlin recognizes s. 7 can be used outside of admin of justice, she refuses to do so here

Chaoulli

Facts	● P is physician who tried unsuccessfully to have home-delivered medical activities recognized and to obtain license to operate independent private hospital → spoke out against long wait times in QC's health care system ● P contests validity on prohibition on private health insurance and contend that prohibition deprives them of access to health care services that do not come with waiting times inherent in public system
Analysis	● Deschamps found only Quebec Charter violation ● McLachlin, Major and Bastarache agreed with Deschamps AND found s. 7 violation of Canadian Charter ● Binnie, LeBel, Fish dissented **MAJORITY (McLachlin):** ● Says this case is not like *Gosselin* bc claim does not seek govt spending or improved public care → only seeks removal of private insurance prohibition (asking govt to get out of the way) <u>Quebec Charter</u> ● No freestanding constitutional right to health care, but if govt creates a scheme it must comply with QC Charter ● QC Charter broader and not limited to situations involving administration of justice ● For certain surgeries, delays caused by waiting lists increase patient's risk of worsening or death → right to life ● Patients on non-urgent waitlists in pain/cannot enjoy real quality of life → right personal inviolability (security of person) Quebec Charter Infringement NOT Justified ● General goal of prohibition on private health insurance is to promote high quality health care regardless of ability to pay ● Preservation of public health care system is Pressing & Substantial Objective but no proportionality ○ Rational connection MET ○ Minimally impairment NOT MET – absolute prohibition on private insurance not necessary to protect integrity of public health care system, wide range of less drastic and less intrusive measures <u>Canadian Charter</u> Section 7 Violated: ● Life → death from wait times ● Security of the person → physical/psychological harms from wait times (similar to *Morgentaler*, delays for abortion) ● Prohibition on health insurance that would permit Canadians to access health care where gov fails to deliver it in reasonable manner interferes with life and security of the person PFJs ● Objective of law: <u>maintain quality of public system by preventing diversion of resources</u>

	• Prohibitions are arbitrary
	  ○ To NOT be arbitrary, limit must have theoretical connection w legislative goal AND real connection w facts
	  ○ Some govt reports that urge ban on private insurance were rejected
	  ○ Evidence on experience of other western democracies with public health care systems that permit access to private health care refute QC's theory that prohibition connected to maintaining quality public health care
	S. 7 Infringement NOT Justified (s. 1)
	• Pressing & Substantial Objective but no rational connection (evidence falls short of showing that prohibition protects pub health care system)
	  ○ "Indeed we question whether an arbitrary provision … will ever meet the rational connection test"
	• Prohibition also goes further than necessary to protect public system by denying access to medical care and thus is not minimally impairing – court always suspicious with total bans (*RJR*)
	• Proportionate effects NOT MET: suffering/risk of death that result from prohibition outweigh any benefit to the system
	Dissenters: believe s. 7 engaged through the security of the person but find that the objective of law is high quality of healthcare. Says TJ was correct in finding that private insurance would hurt the public system. Relied on reports urging a single tier system and wanted to pay deference to the government.

Conclusion	• QC charter violated, not justified • CAN *Charter* violated, not in accordance with PFJs, not justified
Note	"Institutional competence" → legislatures are good at some things (e.g., balancing competing interests, deciding how to allocate scarce resources) but courts are good at ensuring our constitutionally entrenched rights are protected

SECTION 15

Every individual is equal before and under the law and has the right to the equal protection and equal benefits of the law without discrimination and in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

Section 15 Framework (*Andrews*)

1) Does the law create a distinction on the basis of a protected ground?

- Distinction:
  - "on its face" or "in impact" (e.g., *Vriend* – sexual orientation, *Eldridge* – sign language services, *Fraser* – RCMP pension plan)
  - Intentional or unintentional
  - Burden on claimant (*Sharma*)
- Grounds
  - Listed in section 15
  - Analogous

2) Is the distinction discriminatory?

- Equality must be substantive, not formal equality
- Law factors – not a checklist but used to consider what is discriminatory
  - Pre-existing disadvantage to certain group
  - Correspondence between needs/capacities/circumstances of group and the purpose of the law
  - Ameliorative purpose/effect
  - Nature of interest being affected – are they serious/grave enough to be considered for discrimination purposes
- Reinforces, perpetuates and exacerbates disadvantage (*Fraser*)

Analogous Grounds

- Citizenship (*Andrews*)
  - Non-citizens are part of "discrete and insular minorities"
  - Difficult-to-change personal characteristics
  - Especially where characteristic (citizenship) is "irrelevant" to government decision-making
- Sexual orientation (*Egan*)
  - Deeply personal and difficult or impossible to change
  - History of discrimination and prejudice
- Marital status (*Miron v Trudel*)
  - Choice of mate relates to dignity, freedom
  - Beyond exclusive individual control
  - Associated with patterns of disadvantage for unmarried women
- Aboriginality-residence (*Corbiere*)

- Whether an Indigenous individual resides on or off reserve

Federalism: limits on provincial laws based on alienage (*Bryden v Union Colliery*) and the "Implied Bill of Rights"
- Restrictions on provincial laws in relation to religion (*Saumur*)
- Rule of law (*Roncarelli*)

Statutory Anti-Discrimination Laws
- Human Rights statutes
- Bill of Rights (*Drybones, Lavell, Bliss*)
  - Applied only to federal government
  - Listed some grounds of discrimination (race, national origin, colour, religion or sex) and guaranteed equality before the law and equality of protection by the law

Section 15(1) Charter: every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"
- Expanded, open list of enumerated grounds
- "shall continue to exist" vs remedial
- 3-year delay in applying s. 15(1) as a recognition that legislatures and courts needed to review their decisions and approaches to equality in order to satisfy all the requirements of s. 15 (s. 32(2))

Section 15(2): subsection (1) does not preclude any law, program mor activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(1) Doctrine
- *Andrews*: foundational statement of doctrine
  - First case on s. 15(1)
- *Law*: major doctrinal restatement
- *Kapp*: return to *Andrews*
- BUT…Law-era cases are generally still considered "good law" – attend to both when reading cases
  - Note the formal doctrine and the substance of the Court's decision

Andrews

Facts	• *Barristers and Solicitors Act* s. 42 – BC act that requires Canadian citizenship to become a lawyer • Andrews is a permanent resident in Canada and met all requirements for admission to BC bar except citizen requirement • Claims that requirement violates s. 15(1) *Charter*
Issue	• Does Canadian citizenship requirement for admission to BC bar infringe or deny the equality rights guaranteed by s. 15(1) *Charter* and if so, is infringement justified by s. 1?

Analysis	• "formal equality" – things that are alike should be treated alike – rejected by McIntyre J
	  ○ If this approach was applied literally it could be used to justify the Nuremberg laws
	  ○ Sometimes identical treatment can produce inequality
	• "substantive equality" adopted by court
	  ○ Consider law's content, purpose, effects
	  ○ Large remedial component
	  ○ "evil" of discrimination"
	• Discrimination defined…
	  ○ Distinction, intentional or not, based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group, not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society
	
	Part 1: Distinction based on:
	• Listed ground such as race, national or ethnic origin, colour, religion, sex, age, mental or physical disability

	• Defining analogous grounds:
	  ○ "discrete and insular minorities" vulnerable to being overlooked in political processes
	  ○ Also, difficult or impossible to consciously change situation//position of individual/group (LaForest)
	  ○ Characteristic is "generally irrelevant" to legitimate state objectives
	Part 2: perpetuates stereotypes/disadvantages
	
	Application of Part 1
	• Is there grounds-based discrimination? Yes, distinction on basis of citizenship
	• Citizenship is an analogous ground
	  ○ Cannot vote, non-citizens are discrete and insular minority
	
	Application of Part 2
	• "A rule which bars an entire class of persons from certain forms of employment, solely on grounds of lack of citizenship status and without consideration of education and professional qualifications or other attributes or merits of individuals in the group would infringe s. 15"

Conclusion	• Infringement made out and not justified

Andrews to *Law* to *Kapp*

- *Andrews* to *Law*:
  - Serious splits in approach within Court
  - Main issue: how to tell when a distinction is discriminatory? (part to of Andrews test)
  - Frequent agreement in result without agreeing on test – what is discriminatory?
- *Law*
  - Consolidated test for assessing whether a distinction is discriminatory
  - Consider 4 "contextual factors" to assess whether law impacts human dignity
    - Pre-existing disadvantage of a specific group
    - Correspondence between differential treatment and claimant's reality
    - Whether law/program has ameliorative purpose or effect
    - Nature of interest affected
- *Kapp*
  - Contextual factors/human dignity standard is "confusing and difficult to apply"
  - Return to Andrews: perpetuation of disadvantage and stereotyping as the primary indicators of discrimination

Fraser

Facts	• RCMP pension plan • Pension rewards long, uninterrupted service • Policy: members on leave without pay could "buy back" time off from pension plan and qualify sooner • Job sharing program: full-time pension unavailable for buy-back • Most participants were woman with small children
Issue	• Does the pension plan violate s. 15?

Analysis	SCC affirms *Kapp* framework
	• 1) Differential treatment on protected ground
	• 2) Effect of reinforcing, perpetuating, or exacerbating disadvantage
	
	What is a distinction/differential treatment? 2 types…
	• Facial distinctions (e.g., *Andrews*) – written in the law
	• Distinction that causes adverse impact/disproportionate impact/disparate impact
	  ○ Seemingly neutral law
	  ○ But places "protected groups" at a disadvantage
	  ○ *Simson-Sears*: rule requiring Saturday work, disparate impact against Saturday Sabbatarians
	  ○ *Meiorin*: physical fitness test required for fire fighters based on standard of typical male fitness, not on job demands, disparate impact on female applicants
	  ○ *Eldridge*: failure to provide sign language interpretation, disparate impact on persons with hearing loss

	○ *Vriend*: AB human rights statute protected against discrimination on basis of race, religious beliefs, colour, sex, marital status, age, ancestry, disparate impact on LGBTQ+ persons Distinction/differential treatment ● Explicit distinctions ● Creation of built in headwinds ● Failure to accommodate ● Evidence may include statistical disparities or qualitative accounts of individual experiences ● No need to prove: ○ Discriminatory intent ○ Causal mechanism behind disparities ○ All members of protected group similarly affected ■ E.g., sexual harassment ■ Discrimination based on multiple grounds Application ● 1) Distinction on basis of protected ground? ○ Unavailability of buy-back disproportionately affects women ○ Statistically, evidence about women's disadvantages in balancing professional and domestic work ○ Women's choice to participate in scheme does not mean no discrimination ● 2) Distinction discriminatory ○ Exacerbates disadvantage ○ Evidence women disadvantaged by pension schemes generally
Conclusion	● Section 15 infringement made out

Sharma

Facts	● A convicted of importing cocaine and sought a conditional sentence – served in community ● However, conditional sentencing regime modified in 2012 to make them unavailable for certain serious offences ● These changes made it impossible for A to receive a conditional sentence ● Claims the modifications violate her s. 15 Charter rights
Issue	● Does the inability to receive a conditional sentence violate s. 15?
Analysis	Step 1: whether law creates or contributes to disproportionate impact on the claimant's group based on protected ground. ● Not a facial distinction ● Majority says that claimant's burden at either step not met, no infringement of s. 15 and no substantively unequal outcome ● Claimant must establish link or nexus between impugned law and discriminatory impact ● Two types of evidence are helpful: evidence about full context of claimant's group's situation and evidence about outcomes that impugned law or policy has produced in practice ● Evidentiary burden cannot be unduly difficult to meet ● But here not met, fails evidentiary burden to show provisions had a disproportionate impact on Indigenous offenders Step 2: does distinction impose burden or deny benefit in manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage? ● No statistical information that impugned provisions create or contribute to increased imprisonment of Indigenous offenders, relative to no-Indigenous offenders ● Leaving situation of claimant group unaffected is insufficient to meet step 2 requirement: negative impact or worsened situation is required ● No need to prove legislature intended to discriminate – but contextual approach important: allocation of resources, particular policy goals sought to be achieved, whether lines drawn are mindful as to these factors Under s. 15(1) – no general positive obligation to remedy social inequalities or enact remedial legislation, nor is legislature bound to its current policies. When state does legislate to address inequality, it can do so incrementally. **DISSENT: Karakatsanis**

	• Indigenous over-incarceration is a crisis. Sentencing law uniquely positioned to ameliorate racial inequalities in Canada's crim justice system. • Parl's purpose was to ensure offenders who commit more serious offences serve prison time. While max sentences provide general guidance, guidance only goes so far in individual cases. Fit sentence always defined by totality of circumstances. Step 1: while evidence if statistical disparity and of broader group disadvantage may assist, neither is mandatory. Given relationship between sentencing principles and challenged provisions, the provisions necessarily impact Indigenous offenders different – further evidence not required because distinction is plain. Step 2: fair burden on claimants is only to show that there is a discriminatory impact. State bears burden of justifying its choices and goals. <u>Section 15 Analysis Framework</u> C must demonstrate that the impugned law or state action: 1) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and • Does the impugned law create/contribute to a disproportionate impact on C based on a protected ground • C must establish a link or nexus between the impugned law and the discriminatory impact, but does not need to show why the law being challenged has that impact 2) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage • Whether the impact imposes burdens or denies benefits in a manner that reinforces disadvantage • Not every distinction is discriminatory – negative impact or worsened situation is required • Courts must examine historical or systemic disadvantage of C • Look at arbitrariness prejudice and stereotyping ○ Arbitrariness: distinction based on individual's actually capacities is not discriminatory, but distinction that fails to respond to the actual capacities and needs is discriminatory ○ Prejudice/stereotyping: if impugned law furthers stereotypes and prejudicial notions/ideas about a group, and in doing so, perpetuates disadvantage they experience • Consider broader legislative context – objective of law, whether policy designed to benefit number of different groups, allocation of resources, policy goals, whether lines drawn mindful to these factors THERE IS NO GENERAL POSITIVE OBLIGATION ON THE STATE TO REMEDY SOCIAL INEQUALITIES OR ENACT REMEDIAL LEGISLATION
Conclusion	• No violation

Corbiere

Facts	• Section 77 Indian Act requires band members be residents of a reserve to vote in band elections • Facial distinction on basis of reserve residency • C claims that provision violate s. 15 Charter
Issue	• Is the denial of right based on an analogous ground?
Analysis	Analogous Grounds • When there is a clear distinction, we must be suspicious of whether the distinction is discriminatory ○ "legislative markers of suspect grounds associated with discriminatory decision making" • Analogous grounds serve as a screening function – what are the actual circumstances of a group of people where there is a real possibility of discrimination ○ Avoid trivial claims • Focus on immutability: ○ "actually immutable" – e.g., race ○ "constructively immutable" – e.g., religion • Court focuses on discrete and insular minority, group that has been historically discriminated against flows from central concept of immutable or constructively immutable personal characteristics Majority Decision • Court unanimous that aboriginality-residence is an analogous ground • Personal characteristic essential to band member's personal identity

	• No less constructively immutable than religion or citizenship
	• Can change status only at great cost, if at all
	• Not like "residence" more generally
	Concurring:
	• Important to identity, personhood, community and land
	• History of discrimination
	• Lack of housing opportunities on reserve
	• Leaving reserve often compelled, not chosen
	Discrimination
	• Court uses *Law* factors:
	  ○ Perpetuates historical disadvantage
	  ○ No correspondence between needs/capacities/circumstances of group and the law
	  ○ Affected interests are fundamental - vote
	  ○ Affected interests are fundamental to Indigenous individuals
	Justification under s. 1
	• Not minimally impairing – total ban not shown to be necessary
	Rejected grounds
	• Occupation/employment status (*Re Worker's Comp*, *Delisle*, *Baier*)
	• Province or municipality of residence (*Turpin*, *Haig*, *Siemens*)
	• Marijuana use (*Malmo-Levine*)
	Unresolved grounds: family/parental status (*Fraser*)
	• Need more evidence/argument on family/parental status
	• Need argument on test for analogous grounds in light of scholarly criticism
	  ○ "insular and discrete minorities" and "historic disadvantage" not necessarily flowing from characteristics of actual or constructive immutability

Conclusion	• Infringement made out, not justified

Gosselin

Facts	• QC *Social Aid Act* provided lower social assistance payments to recipients under 30y old • Unsuccessful s. 7 claim

Analysis	• No section 15 violation
	• Facial distinction based on enumerated ground (age)
	• BUT distinction not discriminatory
	  ○ Young people do not suffer pre-existing disadvantage
	  ○ No impairment of dignity, or treatment as less worthy of respect
	  ○ Treated young people as capable, adaptable
	  ○ Distinction designed to incentivize young people to work
	  ○ There is correspondence between law's purpose and needs, capacities and circumstances
	• Law's purpose meets the needs, capacities and circumstances of these individuals
	• The correspondence does not need to be perfect

Conclusion	• No infringement

Canadian Foundation for Children, Youth, and the Law

Facts	• CC s. 43 is an exception to criminal assault for parents and teachers to use reasonable force to correct children

Analysis	• No section 15 violation
	• 1) Explicit distinction present on an enumerated ground (age)
	• 2) Distinction not discriminatory
	  ○ Correspondence with the needs, capacities and circumstances of children
	  ○ Not based on devaluation of children, but on impact of criminalization
	• Binnie J dissenting: impact of criminalization and the correspondence analysis would be better fit in a s. 1 analysis – it is the role of the government to justify why they are creating the exemption, rather than to leave it to the claimants to show the lack of correspondence.

	● Deschamps J dissenting: law compounds children's disadvantage (not minimally impairing)
Conclusion	● No infringement

Section 15 and Section 1

- Consider overlap between s. 7 and s. 1 *Oakes* analysis
- Fraser emphasizes that s. 15 and s. 1 analyses should be separate – do not conflate analysis of s. 15 infringement and s. 1 justification
    - History of disagreement what belongs in s. 15 and s. 1 (role of claimant versus government holding burden)
    - Law factors overlap with s. 1
        - Correspondence between law's purpose and needs, capacities, and circumstances has correlation with rational connection/minimal impairment of *Oakes*
        - Ameliorative purpose/effect of law has correlation with Pressing & Substantial Objective of law
- Is it possible to justify a s. 15 violation? very difficult
    - Because we bring a lot of the analysis into s. 15 and do not leave much for s. 1
    - *Newfoundland v Nape* where law justified under s. 1
        - Delay in implementing pay equity for female hospital workers
        - Law justified by unprecedented fiscal crisis (external factors to the law)

SECTION 35: ABORIGINAL RIGHTS

HISTORY

- *Report of the Royal Commission on Aboriginal Peoples* (1996)
    - Stage 1: Separate Worlds
        - Period in history where Eurpoe had nations coexisting and conflicting and simultaneously, Indigenous people had different legal systems that interacted/coexisted
    - Stage 2: Contact and Cooperation
        - Early stage characterization by equality in resources and power (settlers reliant on FNMI knowledge of land and agreements relatively equal in power)
    - Stage 3: Displacement and Assimilation
        - Outbreak of disease and other factors as colonialism expands → Europeans expressly state their aim is to "get rid" of FNMI people
    - Stage 4: Negotiation and Renewal
        - Greater recognition by Canadian government of FNMI legal orders and finding a path forward with reconciliation and renewal of equal relationships
- Constitution Act, 1867, s. 91(24)
    - Federal government assigned power over "Indians, and Lands reserved for the Indians"
    - To allow the federal government to control land and forward policies of assimilation (including the Indian Act)
- Constitution Act, 1982
    - PART I: CHARTER
        - S. 25: "The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada…"
    - PART II: RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA
        - S. 35(1) The existing aboriginal and treat rights of the aboriginal peoples of Canada are hereby recognized and affirmed
        - S. 35(2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit, and Metis peoples of Canada
        - S. 35(3) For greater certainty, in subsection (1) treat rights includes rights that now exist by way of land claims agreements or may be so acquired
            - Future looking provision that there will be more treaties concluded and those will be protected by s. 35 too
        - S. 35(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons
        - S. 35.1 No amendments to s. 91(24) of Constitution Act, 1867 or s. 25 of Charter or Part II of Constitution Act, 1982 without "constitutional conference" with all premiers and PM and w invitation to representatives of the "aboriginal peoples of Canada" to "participate in the discussions"
            - Further layer of what it would look like to change the text of the Constitution

        - NOT A PART OF THE CHARTER (separate section of the Constitution Act)

Common Law Foundations

- Royal Proclamation, 1763
    - Indigenous peoples "should not be molested or disturbed in the Possession of" unceded and unsold territories
    - Great frauds and abuses in acquisition of Indigenous land
    - "Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians"
    - Only the Crown may purchase Indigenous lands
- Early recognition of Indigenous law as authoritative
    - I.e., custody, divorce, etc.
    - *Connolly v Woolrich* (1867)
- *St. Catherine's Milling* (1888)
    - Royal Proclamation as "source" of aboriginal rights
- *Indian Act* restrictions on land claims litigation
    - 1927-1951
    - Illegal for FNMI people to hire lawyers to support land claims or gather in groups to talk about land
- *Calder* (1973)
    - Title claim brought by Nisga'a elders against BC
    - Specific claim unsuccessful BUT opened the door to recognizing that claims to land do exist for FNMI people
    - SCC: FNMI rights to land arose from prior occupation
        - NOT derived from Royal Proclamation
        - NOT derived from colonial or Canadian law
        - Comes from the fact that FNMI legal orders have and continue to have some claim to the land

Guerin (1984)

Facts	• Indian Act, s. 18(1): reserve lands are held by HMQ for benefit of bands → land may be sold, alienated, etc. only if/when surrendered (in whole or in part) to HMQ
	• Musqueam Indian Band voted to surrender land to HMQ
	• Decision based on understanding respecting terms of future leases
	  ○ ORal terms of Musqueam understanding not in surrender document
	• HMQ leased land to Shaughnessy Heights Golf Club
	  ○ Terms considerably less favourable to the Musqueam Band than originally represented
	  ○ HMQ failed to keep Musqueam Band apprised of negotiations (very dissatisfied)
	• Note: little or no judicial recognition of justiciable rights to Indigenous lands or practices (you could not go to court)

Issue	• Is the Indian Band entitled to damages from the Crown?
Rule	• When an Indian Band surrenders its interest in its reserve land to the Crown, a fiduciary obligation regulates the manner in which the Crown exercises its discretion in dealing with the surrendered reserve land on the Indian Band's behalf.

Analysis	• *Sui generis* "legal right to occupy and possess certain"
	• Ultimate title lies with the Crown
	• Doctrine of Discovery gave title to discovering nations
	  ○ But pre-existing rights of occupancy and possession remain unaffected
	• Rights pre-date and survive claims of European sovereignty
	• Exist even without treat → not treat rights (rights that arise from other types of occupancy)
	• Inalienable except upon surrender to Crown (per Royal Proclamation and Indian Act)
	• Arrangement aims to avoid exploitations → surrender gives rise to Crown duty
	• General inalienability and fiduciary duty "go together"
	  ○ Crown has a duty to act in the best interests of the FNMI that give up land
	  ○ Through *Indian Act*, "Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie" → paternalistic perspective
	  ○ BUT Courts may regulate (supervise) this fiduciary relationship → courts can ensure government actually acts in the best interest of FNMI people

	○ "Equitable obligation" in relation to the *Indian Act* scheme ● Crown NOT entitled to ignore oral terms ○ "Backdrop" in assessing Crown's discharge of obligations ○ Crown should have returned to Band for counsel when unable to secure original terms ○ Crown must "make good the loss suffered in consequence"
Conclusion	● SCC fundamentally reconsidering Aboriginal rights ○ Title ○ Fiduciary obligation ○ Legal remedies available ○ Duty to include Indigenous peoples in decision-making ● … all foundational to s. 35

INFRINGEMENT AND JUSTIFICATION

S. 35 *Sparrow* Test:

- **1.) Is there a *prima facie* infringement of an aboriginal right?**
  - Burden on claimant
  - Does the legislation in question have the effect of interfering with an existing aboriginal right?
    - "Rights" = integral to distinctive culture and continuity with ancient practice
    - "Existing" = not extinguished as of 1982 → sovereign must show clear intent to extinguish
      - Even if it was "wrong" to extinguish the right, the sovereign had the authority to extinguish it pre-1982 (as long as clear intent is shown)
      - Regulation DOES NOT extinguish
  - Consider the FNMI perspective on meaning of right
  - Don't make artificial distinction between right and manner of exercise
- **2.) If so, is the *prima facie* infringement justified?**
  - Burden on government
  - Valid legislative objective?
    - Conservation of resources is a valid objective
    - Preventing harm is a valid objective
    - Shifting resources to user groups without aboriginal rights is unconstitutional objective
  - Government action justified in light of honour of the Crown?
    - Aboriginal food fishing requirements top priority after conservation
    - Consult or inform
    - May call for assignment of entire allocation (after conservation needs are met) to aboriginal rights-holders

Sparrow (1990)

Facts	● S. 35(1) states that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed ● However, it is not immediately obvious what this phrase is promising ● Musqueam Band member licensed to fish for food ● *Fisheries Act* license included net length restrictions ● Charged under Fisheries Act for fishing with too-long net ● Claim: Sparrow had an "existing aboriginal right" to fish (s. 35) and net length restriction inconsistent with s. 35
Issue	● Whether Parliament's power to regulate fishing is limited by s. 35?
Rule	FROM CANLII: ● Section 35 Test: This is a two-part test that sets whether s. 35 rights are interfered, and if so, whether that interference is justified. ● Part One - Interference: does the impugned legislation have the effect of interfering with the existing Aboriginal right? If "yes", then prima facie infringement of s. 35 established and the following must be asked: (i) is limitation on Aboriginal right unreasonable?, (ii) does the limitation impose undue hardship?, and (iii) does the limitation deny s. 35 holders preferred means of exercising Aboriginal right? The onus is on the group challenging the legislation. ● Part Two - Justification: once interference is established, then ask (i) is there a valid legislative objective? If "yes", then (ii) does legislative objective uphold honour of the Crown? The onus is on the Crown defending the impugned legislation.

Analysis	• Embraces rights "existing" as of 1982 → not defined by specific 1982 regulations ("Existing Aboriginal Rights": Term must be interpreted flexibly so as to permit their evolution over time and must reject "frozen rights" approach)
	• "Extinguished" rights not revived → detailed regulation of a practice does not extinguish a right (the sovereign's intention must be clear and plain if it is to extinguish an aboriginal right)
	• Here, ongoing issuance of food fishing licenses to Band demonstrates intent to regulate NOT extinguish the right
	• There is an existing right to fish in the area where the charge was laid, even though not on reserve (s. 35 rights are not limited to reserve land)
	• RIght may be exercised in a contemporary manner → the right is not anchored to a historic version of fishing
	• S. 35 NOT simply codifying or entrenching existing law → it renounces the old rules of the game
	• S. 35 should be interpreted in keeping with the "honour of the Crown"
	  ○ Guiding principle
	  ○ Fiduciary, trust-like relationship
	• S. 1 does not apply to s. 35 claims; however, courts will "demand the justification of any government regulation that infringes upon or denies aboriginal rights"
	S. 35 Test:
	• **1.) Is there a *prima facie* infringement of an aboriginal right?**
	  ○ Burden on claimant
	  ○ Does the legislation in question have the effect of interfering with an existing aboriginal right?
	  ■ "Rights" = integral to distinctive culture and continuity with ancient practice
	  ■ "Existing" = not extinguished as of 1982 → sovereign must show clear intent to extinguish
	  • Even if it was "wrong" to extinguish the right, the sovereign had the authority to extinguish it pre-1982 (as long as clear intent is shown)
	  • Regulation DOES NOT extinguish
	  ○ Consider the FNMI perspective on meaning of right
	  ○ Don't make artificial distinction between right and manner of exercise
	• **2.) If so, is the *prima facie* infringement justified?**
	  ○ Burden on government
	  ○ Valid legislative objective?
	  ■ Conservation of resources is a valid objective
	  ■ Preventing harm is a valid objective
	  ■ Shifting resources to user groups without aboriginal rights is unconstitutional objective
	  ○ Government action justified in light of honour of the Crown?
	  ■ Aboriginal food fishing requirements top priority after conservation
	  ■ Consult or inform
	  ■ May call for assignment of entire allocation (after conservation needs are met) to aboriginal rights-holders

Conclusion	• First case where the SCC adjudicates a s. 35 claim • Court sent back to trial (retrial ordered) because of the new evidence needed in light of the newly established tests

Defining and Limiting Aboriginal Rights

Lax Kw'alaams (2011)

Facts	• Claimed right to commercial harvesting of all species of fish within traditional waters • Historic practice of fishing for many species but trade only occurred for eulachon grease (integral to distinctive culture)

Analysis	• Rights delineated: fishing, including surplus for winter, of large variety of fish
	  ○ Commercial fishing only possible for eulachon
	• Aboriginal rights subject to evolution
	  ○ Both on the method of exercising right and the subject matter of the right
	• BUT rights have limits, both qualitative and quantitative
	  ○ Pre-contact gathering berries does not evolve into right to gather natural gas
	  ○ Right to gather surface copper does not extend to deep shaft diamond mining
	• Qualitative limits:
	  ○ Had record shown significant trade in all available fish, right would not freeze to cover only species in those waters at time of contact

	○ But general commercial fishery qualitatively different from pre contact activity ○ Out of proportion to original importance to pre contact economy ● Quantitative limits: ○ short eulachon fishing season ○ laborious extraction method ○ quantities are small relative to overall pre contact fishing activities
Conclusion	● Right to trade for eulachon grease only (not all species of fish)

Van der Peet (1996)

Facts	● Fisheries Act prohibits sale of fish caught with food fishing license ● Van der Peet as a member of the Sto:lo band ● Sold 10 salmon caught under a food fishing license for $50 ● Charged with unlawful sale of fish under the Fisheries Act ● Claim: sale of fish was an existing Aboriginal right and thus Fisheries Act prohibition violates s. 35 ● CA focused on pre-contact activities as per Sparrow – A argued that Sparrow turned the "right into a relic"
Analysis	● SCC retains a pre-contact focus ● Purposive interpretation of s. 35: purpose is reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown ○ What is the basis for the concept of sovereignty of the Crown if the Doctrine of Discovery has been rejected? ● Not like Charter rights that are held by all people on the basis of dignity – rather based on prior occupation of Indigenous peoples pre-contact ● Calls for a case-by-case assessment of rights ● Integral to distinctive pre-contact society ○ Right should not be merely incidental or occasional ○ One of the things that truly made the society what it was ○ Need not be unique from other societies but cannot be universal (e.g., eating to survive because everyone does that) ○ Cannot be a practice arising post-contact, though adaptation does not undermine the claim ● Consider nature of: ○ Contemporary action claimed pursuant to right ○ Governmental regulation ○ Historic practice ● Define by general rather than specific actions (e.g., modern exercise of rights vs the right itself – do not constrain analysis to historic manner of practice) ● Continuity between pre-contact and contemporary practice is necessary ○ Relevant time period for integral to distinct society is still pre-contact ■ Evidence from post-contact can still be relied upon ■ Aim: prove pre-contact origins of right, not exact manner in which it was carried out ○ Doesn't require unbroken chain of continuity ○ Evidentiary difficulties inherent in adjudicating claims of this kind (necessarily no written records) but this does NOT undervalue evidence of Aboriginal rights claimants ■ Do not apply evidentiary standards of private law ○ Doubt or ambiguity resolved in favour of claimants (generous and liberal interpretation arising from fiduciary relationship) ■ Has this really occurred? ● Application of Test ● Characterization of the right claimed: Aboriginal right to exchange fish for money or other goods ○ Refers to simple exchange, not commercial ● Contemporary action: no evidence claimant sold salmon on other occasions, cannot be characterized as commercial ● Sto:lo practices claimed to include exchange of fish for money as integral aspect ● Government regulation: specific acts charged by regulation as the 10 salmon for $50 ● Exchange of fish is NOT a practice integral to distinctive pre-contact society ○ Exchanges of fish only incidental to food fishing prior to contact ○ Trading only became significant after contact ● No aboriginal right found in this case.

	Dissent ● L'Heureux Dube: test should be substantial continuous period of time and pre-contact focus is arbitrary ● McLachlin: would have found right to continue to use resource including through sale to meet modern subsistence needs ● Emphasis: pre-contact rights that have not been extinguished by 1982.
Conclusion	● No aboriginal right found

Gladstone

Facts	● Fisheries Act Regulation put overall cap on herring spawn fishing at 20% - can only harvest 20% of herring spawn ● This allotment is allocated through licenses among various groups ● Gladstone was a member of the Heiltsuk Band ● Charged with selling herring spawn on kelp without the required license ● Claim: pre-existing right to fish for commercial purposes
Analysis	Van der Peet/Sparrow Framework ● Unextinguished right to commercial fishing exists ○ Commercial sale was central, significant and defining feature of culture prior to contact ○ No evidence of clear intention to extinguish right ○ Regulation constituted prima facie infringement ● Question: infringement justified? ○ Objective of law: overall cap of 20% aims at conservation of herring spawn ○ Conservation is a valid objective as per Sparrow ○ But no evidence of objectives behind allocations within cap – gov was not successful in demonstrating that there was an objective in determining that the allocation would be distributed to many groups, including Indigenous nation ○ Sparrow had not yet been decided at time of trial – idea of priority was not something clearly addressed here New trial ordered on the question of justification for allocation. ● But provides guidance for new trial… ● Commercial fishing differs from subsistence, ceremonial fishing ○ No internal limitation – no limit to satisfy needs of community ○ No evidentiary basis for limiting right (e.g., to moderate livelihood in this case) ● Calls for revision of Sparrow priority in commercial cases ● Gov must show it has taken account of existence of Aboriginal rights an allocated resource in manner respectful of fact that those rights have priority ○ Discretion of Crown very present in determining priority – just has to take rights into account and respect priority – discretion present ○ Procedural and substantive dimensions required to show this ● Objectives of law: even after conservation needs met, infringing distributions may be justified. ● Requires compelling and substantial objectives like… ● Economic and regional fairness ● Recognition of historical reliance upon and participation in the fishery by non-aboriginal groups ● Changes priority – does give priority to Indigenous nation unlike Sparrow… Justification: was the Crown justified in light of fiduciary relationship? ● Courts must consider following factors in justification analysis: ○ Consultation ○ Compensation ○ Accommodation (e.g., reduced license fees) ○ Relative extent of Aboriginal rights-holders participation in fishery (e.g., Kapp – providing 24h exclusive license) ○ How gov has accommodated particular fishing interests (food, commercial, etc.) ○ Importance fishery to economic wellbeing of band in question ● Criteria considered by gov in allocating commercial licenses
Conclusion	● Court ordered new trial for justification

Sappier; Gray

Facts	● Prohibition on possession and harvesting timber on Crown land ● Members of Maliseet and Mi'kmaq bands claimed right to harvest timber on Crown land for personal use ● Gathering birch bark essential to canoe building and basket weaving
Analysis	● Court delineates right: "personal use" is too vague, Court narrowed claim: right to harvest wood for domestic uses as a member of the Aboriginal community (e.g., shelter, transport, tools) ○ Court emphasized importance of practice in the context of way of life ○ Needs to be link to survival that is sufficient to prove integral to the way of life ○ Must be site-specific, linked to traditional territory ● Right infringed without justification ○ Court cautions against focusing on specific anthropological curiosities, and potentially racialized aboriginal stereotypes ● The idea of incidental practice does not come up – does not distinguish between core of practice and what is incidental. Do include use of timber in a variety of ways that is not just for traditional ways, how it was used pre-contact. ● **Nature of right cannot be frozen in pre-contact form but rather must be determined in light of present day circumstances**
Conclusion	● Aboriginal right recognized

Ahousat

Facts	● Ahousaht Band and Nuu-chah-nulth nations made a claim to a broad right to fish and sell fish ● There was evidence that at the time of contact, substantial multi-fish trade for economic purposes ● BUT the broad right recognized excluded geoducks ● Commercial geoduck fishery is high tech and recent ● No viable suggestion of pre-contact harvest and trade
Analysis	● Right to fishing for commercial purposes recognized but NOT for the geoduck ● First case where fishery rights and commercial fishery rights being recognized in such a broad way
Conclusion	● Aboriginal right recognized but not for geoduck

Metis Rights

Manitoba Metis Federation

Facts	● Manitoba Act 1870 is part of Canada's Constitution (under s. 52) ○ It is how Manitoba became part of Confederation ● Section 31 Manitoba Act establishes that 1.4 million acres of land must be allotted to Metis in parcels ○ "children of the half-breed heads of families" ● The land that became Manitoba was 85% Metis at the time of confederation ● Metis resisted Canada's westward expansion ● Canada and Metis governments negotiated terms of *Manitoba Act* ● Canada's implementation of the 1.4M acres was delayed, inefficient and inequitable ○ Gov issued scrips that stated entitlement to parcel of land to Metis children ○ Scrips were never turned into concrete rights to land ○ Random allotment of land rather than in family units ○ Long delays ● Claim: Canada breached its fiduciary obligations under the Manitoba Act 1870
Analysis	● Canada failed to act in accordance with the honour of the Crown ○ Honour of the Crown includes: ■ a fiduciary duty as per Guerin (seek the best interests of Indigenous peoples, to prioritize their interests, to balance interests of Indigenous peoples and other groups) ■ Fiduciary engaged by constitutional obligations to Aboriginal groups ■ Gives rise to duty of diligent, purposive fulfillment ○ Purpose of s. 31 of Act to reconcile the Metis community with the sovereignty of the Crown

	■ Creation of province of Manitoba ■ Objective is to give Metis a head start in the race for land in the new province ○ Breach of honour of the Crown ■ Repeated mistakes, inaction that persisted for more than a decade and that was not consistent with government sincerely intent on fulfilling duty that its honour demanded ■ Aim of head start can no longer be achieved ● After this decision, MMF entered into a memorandum of understanding with Canada to implement what the s. 31 was supposed to do – allot the parcels of land. ○ AB is the only province with Metis settlements that have been recognized
Conclusion	● Honour of the Crown breached

Blais

Facts	● Natural Resources Transfer Agreement (NRTA) ● Constitutional document (Constitution Act 1930) that transferred control of Crown lands/resources to Manitoba ● Right to hunting, trapping and fishing reserved for "Indians" ● Blais (Metis) charged with hunting deer out of season contrary to Manitoba Wildlife Act
Analysis	● Court found that Metis are NOT "Indians" for the purpose of the NRTA ● Metis not considered "Indians" at the time of enactment ● Recall *Re Eskimo* (whether Inuit are considered "Indians" for the purpose of s. 91(24) ● The court might assign different meanings for "Indian" depending on the constitutional or legal provision – e.g., Inuit and Metis are considered "Indians" for the purpose of s. 91(24) ● But in this specific case, Metis not considered "Indians" for the purposes of the NRTA ● Blais: Court's Approach to Interpretation ○ "living tree"? SCC rejected this argument – purposive interpretation should not overshoot or invent new obligations ○ General rules of interpretation should not be a vague sense of after-the-fact largesse ● Borrows: Ab(Originalism) and Canada's Constitution ○ "After the fact largesse" is precisely the kind of generosity resulting from the Persons Case ○ Women were qualified persons to be appointed as Senators within the Constitution despite a historic context that denied them the right to vote or claim political office ○ Overemphasis on past risks perpetuates historic discrimination ○ Aboriginal rights must be interpreted as living traditions
Conclusion	● Metis not "Indians" for purpose of NRTA

Powley

Facts	● ON Game and Fish Act required hunting license ● Powley member of Metis community charged with unlawfully hunting moose without a hunting license and knowingly possessing game hunted in contravention of the Ontario Game and Fish Act ● Claim: existing aboriginal right to hunt for food in Sault Ste Marie area
Analysis	● Purpose of s. 35: reconciling prior occupation with Crown sovereignty ● Metis cultures by definition post-date European contact ● Approach to Metis rights: ○ Constitutionally significant feature of the Metis is their special status as peoples that emerged between <u>first contact</u> and the effective imposition of European <u>control</u> ○ SCC rejects focus on pre-contact practices of Metis aboriginal ancestors ○ Replace pre-contact focus with: historically important features of Metis communities, prior to effective European control, features that persist in present day ● Test for Metis rights ○ Characterize the right (determine what kind of practice the claimant is claiming) (specific to Metis): right integral to distinctive Post-contact but pre-control society ● Identification of historic rights-bearing community ● Identification of contemporary rights-bearing community

	○ Verification of claimant's membership in contemporary community ○ Identification of relevant time frame ○ Van der Peet Test continues: is test integral to distinctive culture of Metis, is practice continuous (happening in past and continues today) ○ Then consider extinguishment (plain and clear intention to extinguish right) ● If infringement, justify with Sparrow test Application ● Characterization of right (same as Van der Peet) ○ Contextual and site-specific ○ Right to hunt for food in environs of Sault Ste. Marie ○ Periodic scarcity of moose does not undermine claim ● Identification of <u>historic rights bearing community</u> ○ Metis established around Sault Ste Marie in mid-17th centuries ○ Peaked around 1850 ● Identification of <u>contemporary rights bearing community</u> ○ Metis community persisted in SSM area despite decrease in visibility after 1850 ○ Displacement and underreporting ○ Metis went underground but continued ● Verification of claimant's membership in contemporary community ○ Court urges standardized membership requirements ○ Necessary to understand who is/is not Metis and who has necessary link ○ Creates 3 broad factors in the meantime: ■ Self-identification (should not be of recent vintage) ■ Ancestral connection (no minimum blood quantum but some proof that ancestors part of historic Metis community – birth or adoption or otherwise) ■ Accepted by community (membership in Metis political organizations, participation in community activities, testimony from other members) ● Identification of Relevant time frame ○ Post-contact but pre-control test ○ Effective control passed form Ojibway and Metis to Europeans just prior to 1850 ● Practice integral to distinctive culture ○ Subsistence hunting and fishing was constant and defining feature of Metis community ○ Certain species might have waxed and waned but that does not mean that the hunting not practiced ○ SSM area included in traditional hunting areas just prior to 1850 ● Establishment of continuity between historic practice and contemporary right ○ Met ● Determination of whether right extinguished ● No evidence of extinguishment ● Conclusion: Metis right to subsistence hunting in this territory infringed
Conclusion	● Metis right infringed

Duty to Consult and Accommodate (*Haida*)

1) Is DTC triggered?

- 1) Real or constructive knowledge of potential s. 35 right?
  - The right might have been claimed in court or in negotiations (real knowledge) or Crown had awareness of existence of potential right (constructive right)
    - Right need not have been recognized by a court (*Haida*)
    - Public assertions of rights are acceptable as constructive knowledge (*Haida*)
    - Treaty/title negotiations are also considered real/constructive knowledge (*Taku River Tlingit; Haida*)
    - Existence of completed treaty does not remove the duty, even if considering a modern treaty (*Beckman*)
- 2) Is the Crown considering an action that might adversely affect a right (practice, title, treaty)?
  - Changes to tree farming licences (*Haida*)
  - Proposal to build road through treaty territory (*Taku River Tlingit*)
  - Taking up land for road, reducing area for treaty-protected hunting (*Mikisew 2005*)
  - Transfer of surrendered treaty land to farer, impacting hunting rights (*Beckman*)

- Legislative action considering new environmental legislation is NOT accepted as an action that gives rise to the DTC (*Mikisew 2018*)

2) What is the degree of consultation/accommodation required?
- Delgamuukw/Haida Nation: sliding scale (low end Crown must
  - At low end, Crown must (*Mikisew 2005*) …
    - Inform themselves of affected right/impact
    - Inform affected groups of Crown's findings (e.g., *Beckman* notice and opportunity to comment)
    - Attempt to deal in good faith with intention of meeting concerns
  - In many cases, consultation may reveal a duty to accommodate
    - E.g., changing proposed project to avoid areas of real importance or concern to nations, monetary compensation
  - At highest end, consent may be required (*Delgamuukw; Haida*)
    - But what is consent for the court? Infringement/justification still possible even if consultation is at the highest end of the possible
  - Considerations for degree of consultation:
    - Prima facie strength of the s. 35 claim
      - Consider tests for practices, title or treaty rights
    - Seriousness of potential adverse effect
      - Heavy impact heightens requirements (e.g., *Haida*)
      - Presence of authorizing treaty provisions (taking up land) lowers requirements (*Mikisew 2005*; *Beckman*)
        - Where treaty involved, there has been negotiation/agreement, either historic or modern, always surrendering of land clause requirements for consultation lower for treaty right
      - Comprehensive modern treaties without consultation requirement lowers (*Beckman*)
      - "minor road" on treaty land = low end (*Mikisew 2005*)

3) Was the duty met by the Crown?
- DTC breached (even at the low end) by unilateral action (*Mikisew 2005*; *Beckman*)
- Consultation must be on specific plans/issues, not consultation in general (*Haida*)
- Duty may be met through a broader environmental assessment process (*Taku River Tlingit*)
  - Duty on Crown but can be delegated to other entities (*Clyde River*) – but notice MUST be given to Indigenous group
- No general obligation to obtain consent/agreement (*Taku River Tlingit*) (*Haida*: no veto)

Sparrow Infringement/Justification
1) Infringement (*Lax Kw'alaams*)?
- Protected right?
  - Practices/traditions or customs (*Van der Peet, Lax Kw'alaams*)
    - 1) Characterization (precise nature of right) (*Van der Peet*) … consider:
      - Nature of action allegedly grounded in right
        - What is the *specific* practice?
      - Government regulation allegedly infringing right
      - Historic practice allegedly establishing the right
      - Examples of narrow characterization:
        - Commercial trade "simple exchange" (*Van der Peet*)
        - Trade in all fish eulachon (*Lax Kw'alaams*)
        - Personal use of wood domestic uses as member of Aboriginal community (*Sappier*)
        - Commerce in all fish exclude geoduck (*Ahousaht*)
        - Self-government regulation of gambling (*Pamajewon*)
    - 2) Is the practice integral to a distinctive society pre-contact (*Van der Peet*) or pre-control (*Powley*)
      - Evidence (flexibly analyzed, accept traditional forms of evidence, oral histories) (*Van der Peet*)
      - Link to survival (*Sappier*)
    - 3) Continuity
      - Need not be an unbroken chain (*Van der Peet; Powley*)
    - 4) Further delineation of commercial rights (*Lax Kw'alaams*)
      - E.g., all kinds of fish or just specific species
  - Title (*Delgamuukw, Tsilhqot'in*) – rights involved with management/use of land, does not involve surrendering of land unlike treaty rights (rather affirmation that territory belongs to nation)
    - 1) Sufficient occupation prior to assertion of Crown sovereignty?
      - Physical reality
      - Implementation/enforcement of Indigenous law

                - Context-specific
            - 2) Continuity of occupation if the present occupation is relied on to prove pre-Sovereignty occupation
            - 3) Exclusivity of occupation
                - Sharing by permission (trespass laws, treaties with other nations)
                - Intention and capacity to control area
            - Incidents of title: manage/profit from land, subject to inherent limits (cannot use land in a way that deprives future generations of interest) + (land inalienable except to Crown)
    - Treaty (*Badger*, *Sioui*, *Marshall*)
        - *Badger* cannons of treaty interpretation
            - Treaty represents solemn promises, sacred agreement
            - Honor of Crown always at stake
                - Presumption Crown intends to keep promises
                - No sharp dealing sanctioned
                - Applies to modern treaties (*Beckman*)
            - Ambiguities resolved in favour of Indigenous parties
                - Historic treaties do not reflect whole agreement (*Marshall*)
                    - E.g., officious bystander
            - Limitations restricting rights must be narrowly construed
            - Heavy burden to prove extinguishment of treaty rights
                - Treaty can extinguish rights (because of surrender of land clauses)
            - E.g.,
                - Truckhouse (trading post) provision includes hunting/fishing rights (*Marshall 1*)
                - Implication of expansive territorial terms subject to Crown use (*Sioui* – claim that nation has religious/spiritual rights to certain areas, Crown said that is subject to crown's use, needs to be compatible w/ crown use)
                - But see *Grassy Narrows*: both federal and provincial level must justify any infringement on treaty rights
        - Based on agreement between Crown and Nation and not the historic practices of nation
        - Rights are enumerated in the treaty
        - Thus does not require *Van der Peet* framework
- Is the right existing (not extinguished) as of 1982
    - Regulation does not extinguish (*Van der Peet*)
    - Unilateral extinguishment only possible by explicit laws (plain and clear intention)
    - Otherwise, bilateral extinguishment which is only present in treaties
- Infringed?
    - (*Van der Peet*: unreasonable infringement, causes undue hardship, preferred means of exercise?)
    - Practice rights examples to determine if infringement has occurred:
        - Restrictions on harvesting timber on Crown land (*Sappier*)
        - Restriction on sale without licence (*Gladstone*)
        - Restrictions on hunting and possessing moose (*Powley*)
    - Title examples
        - Authorizing tree farming or forestry (*Tsilhqot'in; Haida*)
    - Treaty examples
        - Prohibition on camping where treaty allows religious and customary practice (*Sioui*)
        - Fishing licence regime whether treaty includes/implies fishing rights (*Marshall*)
            - Unstructured discretion *Marshall*

2) Justification?

- 1) Procedural duty to consult and accommodate (*Tsilhqot'in*)
- 2) Valid legislative objective (determine purpose of the law)?
    - Conservation (*Sparrow*)
    - Preventing harm (*Sparrow*)
    - IF COMERCIAL (Gladstone)/TITLE (Delgamuukw)/TREATY (*Marshall 2*)
        - Economic and regional fairness – must be robust
    - Title: economic development, settlement of foreign populations, infrastructure, etc. (*Delgamuukw*)
- 3) Justified light of the honour of the Crown?
    - Priority
        - *Sparrow*: Priority (*Sparrow* and *Gladstone*) – if Crown has allocated (after conservation/prevention of harm) to nation in priority

        - If commercial: *Gladstone*: some balance in allocating resources, Crown can allocate to non-Indigenous
    - Proportionality (*Tsilhqot'in*)
        - Look at purpose of the limitation of the rights
        - Rational connection, minimal impairment, proportionate effects